

CO

REPORTS OF CASES

ADJUDGED IN THE

COURT OF ERROR AND APPEAL,

BY

ALEXANDER GRANT,

BARRISTER-AT-LAW.

VOL. I.

TORONTO:
HENRY ROWSELL.
1865.

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REPORTS OF CASES
IN THE
COURT OF ERROR AND APPEAL.

IN THE EXECUTIVE COUNCIL.

[Before the Hon. the Chief Justice; the Hon. J. B. Macaulay, Ex. C.; the Hon. Attorney-General Smith, Ex. C.; and the Hon. Mr. Justice McLean.]

ON AN APPEAL FROM A DECREE OF HIS HONOUR THE VICE-CHANCELLOR
OF UPPER CANADA.

Between WILLIAM SIMPSON, ABEL R. WARD, ELIJAH 1846.
W. BOYCE, HENRY LAKE, RUFUS S. COLLINS, ^{Aug. 25, 26,}
and HENRY GLASS, Appellants, and TERENCE ^{27, 28 & 29,}
SMYTH and HENRY GEORGE SMYTH, Respondents. ^{and} September 2.

Sale of Equity of redemption by sheriff under fi. fa.—Pleading—Demurrer for want of parties—Practice—Power of court to refuse redemption under certain circumstances, upon the construction of the 11th clause of the Chancery Act, 7 Will. IV., ch. 2.—Evidence.

Held, by all the court, that an equity of redemption of an estate of inheritance cannot be sold by the sheriff under a common law process.

The plaintiff in the court below having filed their bill to redeem, setting forth in a schedule the names of certain parties who had purchased portions of the mortgaged premises, and charging them with notice of the defect in the title, but none of whom were made parties, nor was any reason assigned for not including them as parties to the suit; one of the defendants put in a general demurrer for want of parties, which upon argument before the Vice-Chancellor was overruled, on the ground that the prayer of the bill was in the alternative, and to the relief prayed by one of those alternatives the plaintiffs were entitled without those parties being present. *Held*, on appeal, that if for any part of the relief prayed other parties are necessary to be brought before the court, a demurrer to the whole

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bill will hold; but, as the defendant had subsequently to the order overruling the demurrer put in his answer, *held*, that he was too late in making an appeal from that order, and the appeal from the order overruling the demurrer was dismissed *without costs*.

Per Robinson, C. J., and McLean, J.—The Court of Chancery, under the 11th section of the Chancery Act may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.

Per Macaulay and Smith, Ex C.—That the court has not, under this section, power to refuse redemption, where by the law of England the party would be entitled to redeem, but has only a discretion of imposing terms different from those that would be imposed according to the strict rules in England.

One of the several defendants having deposed to a fact, which, if proved by proper testimony, would have tended to defeat the suit as against him as well as against his co-defendants, *quære*, whether his evidence is admissible on behalf of his co-defendants? (a)

Statement.

By the pleadings in this cause, it appeared that in November, 1840, the respondents filed their original bill against *William Simpson*, stating to the effect, that their father, *Thomas Smyth*, deceased, was seised in fee of lots Nos. 1 & 2 in the fourth concession of Elmsley, and that in December, 1810, he had mortgaged the premises to one *Joseph Sewall* for £233 11s. 3d., payable 3rd of August, 1811, which was not paid at the time limited; that *Thomas Smyth*, in December, 1839, duly made his will, and devised the premises to the respondents, subject to a life interest of his widow, which had since determined, and that *Thomas Smyth* died without revoking said will; the bill further stated that the interest of *Sewall* had become vested in *William Simpson*, to whom applications had been made to redeem, and prayed an account, &c.

To this bill *Simpson* filed a plea setting forth that

(a) Abel B. Ward had been examined as a witness for the defendants in the court below, and stated that previous to the transfer from Chas. Jones to himself, Hicock had asked Terence Smyth in presence of Ward, "if his father had any intention to purchase, and Terence Smyth said his father had no such intention; that he had removed the irons from the old saw-mill, and had abandoned the place; and that he (Terence Smyth) was very glad it was going to fall into my hands."

This evidence had been objected to in the court below, and was read *de bene esse*.

The objection, on the part of the respondents, was again made on the appeal. The court appeared to sustain the objection, and directed it to be read *de bene esse*, but no notice is taken of it in the judgments.

Sewall by a deed poll assigned the premises to *Charles Jones*, in 1825; that *Sewall* in Trinity Term, 59 Geo. III., recovered judgment against *Thomas Smyth* for £467 2s. 6d. debt, and £13 13s. costs, and sued out a writ against goods, which was returned *nulla bona*, and subsequently sued out *fi. fa.* against lands directed to the sheriff of the Johnston District, under which the sheriff in 1825 exposed the interest of *Thomas Smyth* in the premises for sale, and that the said *Jones* then bought the same for £105, and by deed-poll dated the 27th of August, 1825, the sheriff conveyed to *Jones* all *Thomas Smith's* interest; that *Jones* by deed-poll of 30th July, 1827, for £600 conveyed to *Trusman Hicock* and *James Simpson* as tenants in common, the former two-thirds, the latter one-third; that *Hicock* conveyed to *James Simpson* two undivided sixths of the premises by two several conveyances of the 31st of January, and the 11th of April, 1831: that *Hicock* on the 2nd of May, 1831, conveyed to *Abel R. Ward* his remaining one-third part of the premises; (a) that *James Simpson* and *Ward*, on the 21st of February, 1832, conveyed the premises in question to *William Simpson* for £5000, and submitted that the respondents had not any title to the premises or right to redeem.

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Statement.

On the 30th of July, 1841, this plea was argued before the Vice-Chancellor, and overruled with costs. Subsequently, and in the month of April, 1842, *William Simpson* put in his answer, and thereby, after admitting the seisen in fee of *Thomas Smyth*, the mortgage to *Sewall*, and the death and will of *Thomas Smyth* as in the bill; the answer set forth the judgment obtained by *Sewall* against *Smith*, the writ of *fi. fa.* against lands, and the sale thereunder of the premises in question to *Jones*, as in the plea mentioned; and relied upon the sheriff's deed as a good conveyance of the mortgagor's equity of redemption; also, that *Thomas Smyth* had

(a) By *Ward's* answer it appeared that *Hicock* only held as trustee for *Ward*.

1846. *Simpson v. Smyth.* relinquished the possession of the premises in question, at the time of such sale, without any steps having been taken to eject him therefrom, and having also withdrawn, not only his personal property, but also the fixtures of the saw mill then erected thereon; and that the price paid upon that sale was then the full value of the property.

Statement. The answer next deduced the title from *Charles Jones* to *William Simpson*, exactly as in the plea, and stated besides, an indenture of the 5th day of June, 1834, between *William Simpson* and *Abel R. Ward*, by which a partition was made of the property in question, and the two-thirds of *Simpson* as well as the one-third of *Ward*, were described by metes and bounds. *Simpson* having stated in his answer the various conveyances set forth in the plea, relied not only upon the legal effect of those deeds, but also upon the constructive assent of *Thomas Smyth*, as well as of the respondents, to such sales. The answer stated, that subsequently to the sheriff's sale, *Charles Jones* was willing that *Thomas Smyth* should redeem the property, which was communicated to *Thomas Smyth* and the respondents, who for a considerable period endeavoured to raise the funds necessary to redeem, and had also offered the property for sale to various persons, and that *Jones* had refused to sell to any person else, until an offer had been made to *Smyth* to redeem. (a) That after the terms of the sale to *Abel R. Ward* had been settled, *Trueman Hicock*, whom he had requested to become his security for the purchase money, declined (*Simpson* had been informed) to do so, unless assured that *Thomas Smyth* had relinquished all hope of purchasing, and only assented upon the assurance of *Terence Smyth*, one of the respondents, that his father, the said *Thomas Smyth*, was unable to redeem or sell, and assented to the sale to *Ward*. The

(a) By the evidence it was shown that *Jones* had given *Thomas Smyth* one month to pay the amount, and that at or soon after the expiration thereof, the sale to *Ward* was completed.

answer further stated, that *Ward* had taken possession of the property in question upon his purchase from *Jones*, and that it had continued in his possession, or that of his assigns, up to the time of filing the bill. That during all this period, the respondents had resided in the vicinity of the property in question, as had *Thomas Smyth* until his death; and that they had seen the extensive and costly improvements made by *Simpson*, without remonstrance. That *Terence Smyth*, in 1832, wrote to one *Shaw*, then about to purchase a portion of the property, that in his, *Terence Smyth's* opinion, *Shaw* or any person else might purchase without fear of being disturbed by his father. (a) Under the circumstances *Simpson* relied on the 11th clause of the 7th Wm. IV., ch. 2. The answer disclosed that a considerable portion of the property in question had been set apart by the proper authority for the use of the Rideau Canal; and a schedule annexed contained the names of all the persons to whom *William Simpson* had sold any portions of the premises as village lots, and the answer submitted that her Majesty's Attorney-General, and the various sub-purchasers, ought to have been parties; thereupon the respondents, in the month of December, 1842, amended their bill by (amongst other things) making the appellants *Ward, Boyce, Lake, Collins, and Glass*, parties defendants thereto. And in such amended bill, after stating the various conveyances set forth in the answer to the original bill, and the deed of partition, they stated that subsequently to the execution of the deed of partition, the appellant *Simpson* had conveyed various portions of the property sought to be redeemed, to certain persons whose names were set out in a schedule thereto

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Statement.

(a) The letter here referred to was in the following words:

"MERRICKVILLE, 10th May, 1832.

"DEAR SIR,—Yours of the 8th instant is duly received, and in reply, beg to observe that *Simpson's* title to *Smyth's* Falls, depends upon the legality of the sheriff's deed, together with my father's right of redemption, agreeable to the laws of England with regard to mortgages; but my opinion is, that you or any other person may purchase without any fear of being disturbed by my father.—I remain, &c."

"T. SMITH."

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annexed. And that *Abel R. Ward* had also made various sales, but that they were unable to discover the names of such purchasers; and the bill also charged notice to each of the sub-purchasers of the claims set up by the respondents, and prayed "that defendants might answer, and that an account might be taken of what remained due for principal and interest on the said mortgage, and of the rents and profits of the said mortgaged premises, received by defendants and others, the purchasers of any of the said village lots so conveyed as aforesaid, or any other person or persons by their order or for their use, or which without their wilful default or neglect might have been received; and that upon payment of what, (if any thing,) should appear to be due for principal and interest on the said mortgage, after deducting the said rents and profits, plaintiffs might be admitted to redeem the said premises, and that the same might be re-conveyed to plaintiffs and their heirs, and that any surplus of the said rents and profits above what should appear to be due for principal and interest on the said mortgage, might be re-paid to plaintiffs; or that an account might be taken of the rents and profits of the said mortgaged premises received by defendants, or any other persons or person, by their order or for their use, or which, without their wilful default, might have been received; and that upon payment of a proportionate part of what (if any thing) should appear to be due for principal and interest on the said mortgage, after deducting the said rents and profits, plaintiffs might be admitted to redeem so much of the said mortgaged premises as defendants are interested in, and that the same might be re-conveyed to the plaintiffs, and that any surplus of the said rents and profits above the said proportionate part, might be re-paid to plaintiffs without prejudice to their proceeding against the other purchasers of the said village lots, for the redemption of the same; or, that upon payment of what (if any thing) should appear to be due for principal and interest on the said mortgage, after deducting the said last mentioned rents

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and profits, plaintiffs be admitted to redeem the said parts of the said mortgaged premises wherein defendants are interested, and that the same might be re-conveyed to plaintiffs; and that any surplus of the same rents and profits above what should appear to be due for principal and interest on the said mortgage might be re-paid to plaintiffs, and that the said *W. Simpson* and *A. R. Ward* might pay the plaintiffs the value of the residue of the said mortgaged premises, and a compensation for the rents and profits thereof, not accounted for, or the purchase moneys or money received in respect thereof, with interest from the times or time of receiving the same, at the option of plaintiffs; or, that upon payment to the said *William Simpson* and *A. R. Ward* of what (if anything) should appear to be due for principal and interest on the said mortgage, after deducting the rents and profits of the said mortgaged premises, received by the said *William Simpson* and *Abel R. Ward*, or any other persons or person, by their order, or for their use, or which without their wilful default might have been received, plaintiffs might be admitted to redeem such parts of the said mortgaged premises as the said *William Simpson* and *Abel R. Ward* continue interested in, and that the same might be re-conveyed to plaintiffs, and that any surplus of the said last mentioned rents and profits, above what should appear to be due for principal and interest on the said mortgage, might be re-paid to plaintiffs by the said *Simpson* and *Abel R. Ward*; and that the said *William Simpson* and *Abel R. Ward* might pay to the plaintiffs the value of the residue of the said mortgaged premises, and a compensation for the rent and profits thereof, not accounted for, or the purchase moneys or money received in respect thereof, with interest from the times or time of receiving the same, at the option of plaintiffs, and for further relief."

Statement.

To the bill so amended the appellant *William Simpson*, in the month of March, 1843, put in a general demurrer for want of parties, alleging as cause of demurrer that

1846. the several sub-purchasers named in the schedule to the amended bill were necessary parties; which demurrer the Vice-Chancellor on the 11th of July, 1843, overruled. After the demurrer of *William Simpson* had been overruled, the appellants *Simpson*, *Ward*, and *Glass*, put in their several answers, and *Lake*, *Boyce* and *Collins* answered jointly, in which they respectively set up the defences relied upon in the pl. ^d demurrer of *Simpson*, as also the equitable grounds relied upon in *Simpson's* answer to the original bill.

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Evidence was taken, the important parts of which are noticed in the judgment of the court.

[The seisin of *Thomas Smyth*, the mortgage to *Sewall*, the sheriff's sale in 1825, and intermediate conveyances, the possession of *Ward* and those claiming under him, from the sale by *Jones* to him in 1826, and also the extensive improvements made upon the premises, were either admitted or clearly proved.]

Statement.

The cause came on to be heard on the 4th of June, 1845, when his Honour the Vice-Chancellor made the following decree:

"His Honour doth order and decree, that it be referred to the master of this court to take an account of what is due to the plaintiffs on the mortgage security in the pleadings mentioned, and to compute interest thereupon; and it is further ordered, that it be referred to the master to take an account of the present value of the improvements made by the defendants on such of the mortgaged lands as are in their possession, or as are claimed by the said defendants; and it is ordered, that it be referred to the master to set an occupation ground-rent on such of the mortgaged lands as are claimed by the said defendants during such time as the same have been beneficially occupied by them, or their tenants, since the execution of the said mortgage, and to calculate the amount thereof,

and an occupation ground-rent on such of the said mortgaged lands as have been sold during such time as the same were beneficially occupied by the defendants or their tenants after the creation of the mortgage and before the sale thereof, and to calculate the amount thereof; and it is further ordered, that it be referred to the master to take an account of such of the mortgaged lands as have been sold, and of the terms on which the same were sold, and of the moneys received by the defendants or any of them, or by any person or persons by their order or for their use, on account of such sales, and to calculate interest thereon; and his honour doth order and decree, that the mortgage money and interest, and the aforesaid value of the improvements be set against the amount of the said ground rent, and of the said purchase moneys received by the said defendants, and the interest thereof, and that a balance be struck, and that the party from whom such balance shall appear to be due, do pay the same to the other party; and in case such balance shall appear to be due from the said plaintiffs to the said defendants, then upon payment thereof it is ordered, that the said defendants do convey and assure such of the mortgaged lands as are vested in them unto the plaintiffs, or as they shall appoint; and in case such balance shall appear to be due from the defendants to the said plaintiffs, then that the said defendants do pay the same, and convey and assure such of the mortgaged lands as are vested in them unto the plaintiffs, or as they shall appoint; and his honour doth further order, that the said defendants do assign to the plaintiffs any contracts which they have made for the sale of any of the mortgaged lands, and which may remain in any respect open and unperformed; and it is further ordered, that such mortgage money and interest aforesaid be divided amongst the said defendants rateably and in proportion, and that every defendant receive the value of his own improvements, after deducting such ground-rent as aforesaid, in respect of the lands occupied as aforesaid by himself or his tenants, and such part of

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1846. the aforesaid purchase moneys as he has received, with interest thereon; and in taking the accounts hereby referred to the master, he is to make to the parties all just allowances; and for the better taking of the same, the parties are to produce before, and leave with the master upon oath all deeds, books, papers and writings in their custody or power relating thereto, and may be examined upon interrogatories as the master shall direct; for which purpose, and for the examination of witnesses in the taking of the said accounts, if necessary, a commission or commissions may issue into the country, directed to proper commissioners; or such examination may be had before an examiner or examiners of this court in the country, as the master shall direct; and his honour doth reserve the consideration of costs, and of further directions, until after the master shall have made his report.'

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Statement.

From this decree, and the several orders overruling the plea and demurrer of *William Simpson*, the defendants (in the court below) now appealed; and on the appeal coming on for argument,

Mr. *Sherwood*, Q. C., Mr. *Sullivan* and Mr. *Blake*, appeared as counsel for the appellants *Simpson* and *Ward*; and with reference to the order overruling the plea, stated briefly the possession of *Thomas Smyth*, the father of the respondents, the mortgage and bond to Mr. *Sewall*, and subsequent judgment and execution against lands, under which the sheriff had seized the lands now sought to be redeemed, and sale to *Jones*. *Jones* claiming the fee, sells, and after various mesne assignments the estate vests in the appellants. The *Smyths* having filed their bill to redeem, *Simpson* pleaded these matters in bar; and the question that arises is, could the sheriff sell *Smyth's* equity of redemption under a writ of *fiery facias* issued against lands? and secondly, if the equity of redemption were saleable under that writ, has the sale of the land conveyed it?

First, is the equity of redemption saleable under this

writ? If it be not, it must be on the ground either (first) that equitable interests cannot be sold under a common law process, or (secondly) that the words of the statute (5 Geo. II., ch. 7) are not comprehensive enough to embrace such estates.

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Now, as to equitable interests not being saleable under common law process. At common law, two writs only were known for the recovery of debts; the *feri facias*, against goods, and the *levari facias*, against corn growing, &c. (a) The only remedies against lands known at the present day, we owe to express enactments; and the first statute which subjected lands to judgment, is that of Westminster, 2nd., (b) which allows the plaintiff to have either a writ of *feri facias* directed to the sheriff, "or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one-half of his lands, until the debt be levied upon a reasonable price or extent;" but it is observable in the first place, that *land* is the only word used in the Statute of Westminster, "*Mediatatem Terræ*," and therefore no argument can be fairly deducible from the construction of that statute; and, secondly, that uses and trusts were unknown at the time the Statute of Westminster was passed, and but little understood at the date of the Statute of Treasons; for if uses had been then known, it is evident the clergy would have taken advantage of them in their memorable struggles for aggrandisement, but we find that the Statute "*De Religiosis*" takes no notice of them, though passed to prevent alienations in mortmain, and indeed although uses were in all probability devised by the clergy in order to defeat the Statute *De Religiosis*, still they did not become of frequent occurrence till the contest between the houses of York and Lancaster, in the reign of Richard II., obliged men to devise some mode to prevent the frequent forfeitures that were then made; and

Argument.

(a) Sir Wm. Harburt's case, Co. 11 b, 12 c.
(b) 18 Ed. 1 ch. 18.

1846. hence Lord *Bacon* assigns that reign as the period of
 the introduction of uses. (a) Therefore it is evident that
 neither the Statute of Westminster, which was passed
 before uses were known, nor the Statute of Treasons,
 which was enacted before they became a common mode
 of conveyance, could be construed to include any thing
 save *land at common law*. But when conveyances to
 uses became of more common occurrence, although mere
 creatures of equity, (for we know that *John Waltham*,
 Chancellor to Richard II., devised the subpoena return-
 able in *Chancery only*) still we find some general and
 many special acts of parliament in this reign enacting
 forfeiture of lands held to uses; (b) and subsequently,
 the statutes 1 R. III., and 9 H. VII., ch. 15, make lands
 liable to execution issued against the *cestui que use*; there-
 fore the doctrine that equitable interests cannot be
 made the subject of sale under a common law process, is
 not founded in law; for although the Statute of West-
 minster, 2nd, which relaxed the common law in favour of
 creditors, and gave a remedy against land, did not extend
 to uses, still uses were then unknown; and when known,
 we find the legislature subjecting them to *common law*
process. But when the statute of Henry VIII. abolished
 uses, and trusts sprang into existence, (the mere crea-
 tures of, and cognisable only in courts of equity,) do we
 find the legislature regarding the sale of equitable inter-
 ests by common law process as incompatible? On the
 contrary, the Statute of Frauds was passed for the
 express purpose of subjecting those equitable interests to
 this process. Now when we examine the words of this
 statute, we find several points worthy of observation;
 and first, we find nothing in the statute having any refer-
 ence to chattel interests in land; the word "land" is
 said, by *Shepherd*, in his *Touchstone*, (p. 92,) to mean
 "frank tenement" at least; and further, at page 88,
 and Cro. Car. 293, where "he having freehold and inter-
 est for years, devise *all his lands*," freehold only will

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Argument.

(a) Bac. Uses, p. 24.

(b) 21 R. 2 C. 3.

pass, and the words "tenements and hereditaments" in that connexion cannot refer to a term of years. And when we examine the statute with a view to determine what remedy it affords in case of trusts of *the fee*, we submit that the words are amply sufficient to include all manner of equitable interest; the language of the statute is: "*In any manner of wise seised or possessed of;*" which will of course embrace an equity of redemption. But when we remember that the legislature was not devising a new mode of execution, to be applied to a new species of property, then for the first time rendered liable to the claims of creditors, but was applying to such new species of property the different writs of execution already in use, we shall find in the subsequent words enough to qualify the general expression; for the sheriff is only authorised to make such execution when the trustee is "*seised or possessed in trust for him against whom execution is so sued.*"

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Now when we consider the nature of the writ of *elegit*, as connected with these words, it will be seen that the legislature can only have intended to include cases of simple trust, because where the trusts are in favour of some other person as well as the person against whom execution issued, upon what principle of law or justice could the legislature permit the sheriff to deliver a moiety of such trust lands, disregarding the interest of the other *cestui que trust*; or what consistency would there be in delivering possession of land to-day, which might be recovered by the other *cestui que trust* to-morrow. And that this is the true reason that the equity of redemption on a mortgage in fee, was not, and indeed could not have been intended by the legislature to have been included in the 10th section of the Statute of Frauds, seems almost demonstrated by the recent English statute 1 & 2 Victoria, ch. 110; the words of which are incorporated in the writs devised by the court under the act, (a) and are certainly amply wide enough to comprehend

Argument.

(a) 5 Bing. N. C. 366.

1846. the equity of redemption. Yet it is not included in the 11th section, because the writ of *elegit*, directing the debt to be made from the profits, not from the sale of the land, is inapplicable to that sort of interest; and therefore the 18th section makes provision that the judgment shall be a charge upon the equity of redemption.

(a) Now when we seek to test these conclusions by the decisions which have been come to on the statute, we shall find the first position borne out by various decisions, although it is respectfully submitted, that the grounds upon which those decisions have been placed, cannot be considered as the true ground upon which they ought to rest. And upon the second point, although we find no direct decision to warrant that conclusion, still we are not without ample authority from the text writers to confirm our judgment; but here, too, we find those statements founded on vague general views of the subject, and not upon those clear principles of reason which, in a matter of such vital practical importance, one would be warranted in expecting. *Lyster v. Dolland*, (b) *Scott v. Scholey*, (c) are the cases relied upon by the other side, but both cases seem to be decided upon grounds peculiar to *trusts of chattels*; and in neither was the decision rested upon this—that equitable interests could not be sold under common law process. Then as the text writers on the second point, namely, the power of the sheriff under a writ of *fi. fa.* to sell the equity of redemption upon a mortgage in fee, (d) while they deny the existence of such a power, do yet, as is humbly submitted, rest such denial upon most unsatisfactory grounds. But *Saunders on Uses and Trusts* (e) seems to place the matter on the proper footing. And the view contended for by the appellants seems to be borne out and elucidated by the judgment in *Dr. Ann. Hull v. Greenhill*. (f) Thus we are

(a) 2 Sug. 398.

(b) 1 Ves. Jun. 481.

(c) 1 East. 467.

(d) 2 Sug. V. & P. 393, 10th ed.; 1 Sug. V. & P. 541, 9th ed.; Powell on Mortgages, 254 a, 256 a.

(e) 4th ed. vol. i, page 275.

(f) 4 B. & Al. 687.

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led to conclude that an equity of redemption on a mortgage in fee cannot be extended under the statute of frauds, and we do so not on vague and uncertain grounds, but on sound principles of reasoning; not on the general assertion that the statute is not comprehensive enough to include such interests, because no doubt under the word *hereditament* such interest will pass; (a) but on the ground that, although the words are sufficient to comprehend it, yet from the very nature of the interest, and of the writ of *elegit*, it cannot have been the intention of the legislature to subject it to extent; and this view will fully explain the language of the Vice-Chancellor in *Forth v. Norfolk*, (b) cited by Mr. Powell in support of his argument. Now if the end proposed by the 5 Geo. II. be the one aimed at by the 29 C. II.; and if the means of attaining that end be the same in each, it is admitted that the reasons already adduced will go far to shew that the equity of redemption cannot be sold under the provisions of the former. But if the end proposed in each be different: if the means pointed out for the attainment of that end be materially different, and if the language of those acts be remarkably dissimilar, then it is submitted that those arguments, which prove that the equity of redemption cannot be extended under the Statute of Frauds, cannot with any shadow of justice be applied to the 5th Geo. II. The preamble to this act sets forth that "His Majesty's subjects trading to the British plantations in America, had lain under great difficulties for want of more easy methods of proving, recovering and levying debts due to them than were then used in some of the said plantations; and, that it would tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain, to the natives and inhabitants of the said plantations, and to the advancing of the trade of the kingdom thither, if such inconveniences were remedied." And the enacting clauses

Argument.

(a) 1 Powell on Mort. 252 and notes.

(b) 4 Mad. 608.

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show that the object of this statute was, first, to make a species of property theretofore not liable to sale, subject to be sold for the satisfaction of *simple contract* debts: which was altogether different from the end proposed by the 29th Chas. II.; and secondly, such end is attained, not as in that act, by means of the writ of execution before then in use, but by subjecting them to sale under *fi. fa.*, by which they could not before have been affected. Now let us first enquire if trust estates of any description are rendered liable under 5 Geo. II., and that trust estates are included is too plain for argument. Consider the object of the statute. If trust estates are not included under 5 Geo. II., then even the remedies furnished by the 29 Chas. II. are abridged; but such a notion is most effectually exploded by the reasoning in *Gardiner v. Gardiner*. (a) If, then, trust estates are rendered saleable under 5 Geo. II., and it seems impossible to contend against that, by what rule of construction it may be asked shall an equity of redemption be excluded? The words of the act include it. It falls in with the object and intentions of the legislature; it is in no respect a violation of any principle of law; and the words of the act are "the houses, lands, negroes and other hereditaments, *belonging to any person indebted*;" it does not speak of a person being *seised in trust for the person indebted*, as in the Statute of Frauds, by which words an equity of redemption is excluded. And lastly, the king and the subject are placed on the same footing by the statute of Geo. II. Now equitable interests and equities of redemption, were always held to be saleable under an extent at the suit of the Crown. (b) And the decisions which have been come to on the annuity act, would seem to furnish a strong analogy for holding that the legislature is not to be held as excluding, but rather as including equitable interests. (c) The language, too, of the 25th Geo. III., ch. 35, is very strong;

(a) 4 U. C. Q. B. 520.

(b) *The King v. De La Motte, Forrest*, 162; 3 Pres. Abst. 353.(c) *Tucker v. Thurston*, 17 Ves. 181.

the object of that act is to render the lands of debtors to the Crown saleable. The words are, "The right, title and interest of any debtor in any *lands, tenements, and hereditaments*, may be sold." And these have been held to embrace an equity of redemption. (a) But it may be argued that this construction will, *by implication*, make an important alteration in the law as it existed prior to the 5th Geo. II., converting that into legal assets, which was before equitable, without express words to that effect. It is unnecessary to pause to point out the difference between rendering property liable in the lifetime of the debtor, and constituting it assets after his decease; because it is admitted that all which is rendered liable in his life-time is made assets after his decease; but it may be answered that the mutations on this subject in England have been at the least to the full as extensive, without affording ground for any such argument as that urged against the construction contended for. Trust estates were not formerly assets at all; and we do not find the Statute of Frauds making them *equitable assets*, (although the trusts were not recognised at all at common law,) but *legal assets*.

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Argument.

Real estate was not at common law assets, in any wise, to satisfy simple contract debts; but we find that lands, by the statute 3 and 4 Wm. IV., ch. 104, are made assets, and singular enough, not *legal*, but *equitable*; an equity of redemption was equitable assets; but the 1 and 2 Vic., ch. 110, s. 18, charges it with a legal judgment, and gives the remedy. And surely an alteration by which an equity of redemption would be rendered saleable under a *fi. fa.*, cannot be regarded as more vital than the changes confessedly made by the act now under consideration; by it, lands, which were only real assets to be reached *through the heir*, and only for the satisfaction of real securities, are made assets, *legal assets* in the hands of an executor, and that, too, without providing for the priority of real securities.

(a) 1 Saund. Uses, 277.

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These considerations, supported as they are by English authorities, would seem, it is submitted, to furnish strong grounds for the opinion, that lands are not only assets to be reached through a judgment against the executors, but that they are assets in their hands, and as such are under their controul, and saleable by them; such at least would seem to be the result of *Thompson v. Grant*. (a)

Argument.

As to the order over-ruling the demurrer. The bill having been filed by those entitled to the equity of redemption against some of those entitled to the legal estate, without any reason being assigned on the face of the record for this proceeding, *a demurrer was put in for want of parties*. In support of this demurrer it was argued, that a mortgagee, inasmuch as he becomes the absolute owner at law, is, upon default made, entitled to encumber his estate as he may find convenient; and that the mortgagor, when he comes into equity to redeem, must not only bring all such encumbrancers before the court, but must bring them at his own expense, because all happened through his default. (b) As the general rule, therefore, the application to redeem must be made by the person entitled to the equity of redemption, and against all those entitled to the mortgage money, and those in whom the legal estate has vested. And conversely, the bill to foreclose must be filed by those entitled to the whole mortgage money, against the persons entitled to the entire equity. (c) That such is the general rule, and that this bill departs from such rule, it was assumed would not be denied, but it was surmised that an attempt would be made to support the pleadings upon the principle of the recent decisions before Lord Cottenham. (d) Assuming the principle of Lord Cottenham's decisions to apply at all, (which was denied,) it was observed that the bill is *prima facie* demurrable; it is

(a) 1 Russ. 540.

(b) *Wetherel v. Collins*, 3 Madd. 255; *Yates v. Hambly*, 2 Atk. 237.(c) *Palmer v. Earl Carlisle*, 1 S. & S., 428; *Osbourn v. Fallows*, 1 R. & M., 741.(d) *Mare v. Malachy*, 1 M. & C. 559; *Walworth v. Holt*, 4 M. & C. 619.

founded on one contract, and yet leaves the rights of several persons interested thereunder undetermined. It is therefore a bill which, without any reason assigned, splits up suits; and instead of concluding the entire matter in one proceeding, it affects only such parts of that general object as suited the whim of the respondents, and that without any reason assigned on the record. This is a good ground of demurrer. (a) Now, it cannot be contended that the decisions relied upon establish that any particular number of parties is so great as of itself to warrant the court in saying, that the established rule for avoiding multiplicity of suits is to be disregarded. In *Harrison v. Stewardson*, (b) there were twenty creditors held to be necessary; and in *Holland v. Baker* (c) fifty-four creditors had been made parties. If, therefore, no definite number has been fixed upon, as in itself so great as to warrant, without more, the disregard of the established rules, the result is, that the necessity of making all persons interested, parties, or the propriety of omitting them, is in all cases a question of expediency, depending on the circumstances; and consequently, each bill must contain such reasons or grounds as will induce the court to depart from its rule, and dispense with the absent persons. (d) But in truth, the decisions before Lord *Cottenham* do not apply; they are all based upon the doctrine of representation, which has not and cannot have any application here. You cannot, on the doctrine of representation, take an account or distribute a fund in the absence of any party interested. (e)

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Argument.

But it is contended, that some relief may be granted in the absence of the parties having the legal interest in portions of the mortgaged estate, who have not been brought before the court, and consequently the *general* demurrer must be overruled. It is, however, obvious, that such argument, if sound in itself, does not meet the

(a) 1 Ver. 29; Mitf. 188.

(b) 2 Hare, 530.

(c) 3 Hare, 68.

(d) *Holland v. Baker*, 3 Hare, 68.

(e) *Evans v. Stokes*, 1 Keen, 24; *Hawkins v. Hawkins*, 1 Hare, 543.

1846. objection, for by the bill in question, an attempt is made to divide into several suits that which ought properly to be determined by one. Now, it is submitted, such a state of things can never be permitted, without some reason for it being stated on the record. But the argument stated is not valid, for a demurrer for want of parties is always general, and consequently must prevail, though some part of the prayer might properly be granted on the hearing. The rule in equity is, that the defendant may always demur *ore tenus*, *provided such demurrer is coextensive with that upon the record*. Now, a defendant who demurs generally upon the record for want of equity, is always permitted to demur *ore tenus* for want of parties. The conclusion is inevitable, that a demurrer for want of parties is to the whole bill. (a) The matter however is no longer depending on general reasoning; there is a recent decision directly in point. (b) Therefore some part of the prayer, being confessedly wrong, and such as could not be granted in the absence of several persons who had not been made parties, the bill was clearly liable to general demurrer, and the order overruling it must be reversed on this appeal.

Argument.

Mr. *Hagarty*, for the other appellants.

Mr. *Harrison*, Q.C., and Mr. *Esten*, for the respondents. As to the order overruling the plea, the act of the 5th Geo. II. contemplates two objects: first, to facilitate the proof; second, the recovery of debts.

The only means taken for the latter purpose are, first, to make lands assets for the payment of simple contract debts; second, to subject them to the same process as personal estate. Personal estate is left entirely as it was. The enquiry then always is in any given case, what is your remedy against personal estate? for whatever it be, the same remedy you have against lands. Now the

(a) *Pyle v. Price*, 6 Ves. 779. (b) *Lidbetter v. Long*, 4 M. & C., 286.

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remedies against personal estate are various, according to the nature of the interest and the circumstances of the case; if your interest in personal estate be legal, you sell it under the *fi. fa.*; if equitable, you proceed by bill in equity; and if your estate be an equity of redemption, you may either apply to redeem, or pray a sale subject to the mortgage. The remedies against personal estate therefore being various, according to the circumstances, you must always, in determining what remedies you have against lands, take the circumstances of the case into consideration; for if you apply to lands one sort of remedy or process, under circumstances which would make it necessary to resort to another with respect to personal estate, you do not observe the 5th Geo. II., but you depart from it.

If personal property be mortgaged, and the condition broken, the interest or equity of redemption of the mortgagor is not saleable under legal execution; the remedy of the creditor is by bill in equity, either for a redemption of the mortgaged property, or for a sale subject to the mortgage, *Scott v. Scholey*, (a) in which case the security comprised both a term for years and moveables. Now lands of inheritance mortgaged, after breach of the condition, are in precisely the same situation as personal property so circumstanced. You must apply the same remedy to both. We have already seen what that is; it is not a sale under a *fi. fa.*

Argument.

It may be said that this is a circuitous remedy; the answer is, that the legislature was content to place lands on the same footing as personal estate; it did not mean to give a better remedy against lands than against goods. It may also be said, that if this construction prevail, the statute does not vary the remedy against an equity of redemption in lands of inheritance, for before the statute it was the same as against a similar interest in goods.

(a) 8 East. 466.

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1846. This is true, but it surely cannot be argued, that because the statute, where it finds the remedies different, makes them the same, and where it finds them the same it makes them different.

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It is also said, that a mortgagee of chattels may sell after notice to the mortgagor; this may be true; and in this case he is in the same situation as a mortgagee of lands with a power of sale, which does not vary the nature of the equity of redemption; the question is not whether the mortgagee can sell, but whether the sheriff can sell; he sells the interest of the mortgagor, which is not altered by the existence of a power of sale in the mortgagee; it is not pretended, that a mortgagee of a term for years without a power of sale can sell after notice to the mortgagor.

Argument. An equity of redemption of a term, is confessedly not made saleable or subject to legal process by the act; of which the principle is to assimilate lands to personalty. Now it would be absurd to say, that an equity of redemption of lands of inheritance more resembled personalty than that which is personalty already, namely, an equity of redemption of a term. It is true that the Statute of Frauds subjects trusts of inheritance, and not trusts of terms, to legal process, of which the reason is not very obvious; but the same absurdity does not arise, because it was not the object of the Statute of Frauds to make real estate personal estate, but to make equitable estates legal estates.

It is then contended that the Statute of Frauds is to draw the line between what is subject to legal and what is subject to equitable process; and as it opens the door to some equitable estates, so it admits the whole. We may admit the premises for the sake of the argument, but we deny the inference. We are willing upon this question, for the sake of the argument, to take the Statute of Frauds as a guide, and to admit that trusts of inheritance

are saleable under a *fi. fa.* ; but this will not warrant the sale of equities of redemption, either of goods or lands, under the process ; these interests being wholly untouched by the statute. In fact all the legislative provisions, and they are many, which have had for their object the assimilation of equitable to legal estates, have cautiously excepted from their operation equities of redemption, in consequence of the immense inconvenience which would arise from a contrary disposition. In this particular case, for instance, on a sale of an equity of redemption, the mortgage money would be part of the purchase money, which it would be the duty of the sheriff to see paid before he gave a deed ; for which purpose he must determine how much is due ; a duty which would render it necessary for him to decide some of the most nice and difficult questions of law and practice which engage the attention of courts of equity

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Upon all these grounds it is submitted, that the sheriff's sale in the present case did not divest the interest of *Thomas Smyth*, but that it remained in him notwithstanding such sale, and devolved under his will to the respondents, who have therefore the right of redemption in the present case, if it exist in any body.

Argument.

As to the order overruling the demurrer : the demurrer complains that the persons named in the schedule to the bill, other than the parties to the suit, being also purchasers of village lots, are not before the court ; and in fact asserts this proposition, that the mortgagee may divide the lands amongst an infinite number of persons, and thereby make redemption impracticable, and deprive the mortgagor of his property. Now, to waive all other points, as being attended with some degree of doubt, and to confine our attention to what is clear, the respondents must be entitled to redeem the portions of the parties before the court, claiming compensation from the vendors of the residue for its alienation. The purcha-

1846. sers selected cannot complain of being selected for this purpose; they suffer no more than they would if all the parties were before the court. No objection can be made to the abstract right of the respondents to this mode of relief. A mortgagee alienating part of the mortgaged property, receiving its value, and giving no notice of the mortgage to the purchaser, cannot by this wrongful act escape the liabilities of a mortgagee; and a course which would be indisputably right in one case, may be voluntarily adopted in another at the call of circumstances different in their nature, but not less imperative. At all events the vendors must be liable to the redemption of the property retained, and to make compensation for the property sold, the respondents waiving all relief against the purchasers, and confirming their titles. To two of the four alternatives (every one of which supersedes all others) prayed by the bill, the respondents are therefore clearly entitled; and as the demurrer is general to the whole bill, and asserts that they are entitled to no part of the relief thereby prayed, it must be overruled. *Lowe v. Morgan*, (a) *Smith v. Snow*, (b) *Meux v. Malby*, (c) *Calverley v. Phelps*, (d) *Hutchinson v. Townsend*, (e) and an anonymous case reported in *Equity Cases Abridged*, (f) were in addition to the cases cited for the appellants, referred to.

Argument.

The right to appeal from the order on the demurrer is waived by answering, entering into evidence, and proceeding to a hearing; after which the demurrer could not be allowed, as that would put the party who had so acted out of court.

[The arguments of counsel as to the merits and the

(a) 1 Br. C. C. 363, Butler's note.

(b) 3 Madd. 10.

(c) 2 Swan 277.

(d) 6 Madd. 229, Story Eq. Pl. p. 174.

(e) 2 Keen 675.

(f) 2 Eq. Ca. Ab. 166 p. 7.

power of the court to refuse redemption, are sufficiently set forth in the judgments delivered.] 1850.

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ROBINSON, C. J.—The respondents, as devisees of their father, *Thomas Smyth*, filed their bill to redeem 400 acres of land in the township of Elmsley, being lots 1 and 2 in the fourth concession, which their father had mortgaged on the 8th of December, 1810, to one *Sewall*, to secure a debt of £296 11s. 3d., payable on the 8th of August, 1811, with interest. They filed their bill on the 25th November, 1840, setting forth, as usual, that the money not being paid the estate had become absolute at law in *Sewall*, and had by divers conveyances become vested in *William Simpson*, the defendant.

On the 22nd of April, 1841, the defendant pleaded to this bill, that *Sewall*, the mortgagee, had, by deed made on the 8th August, 1825, assigned all his right in the premises to *Charles Jones*, to hold in fee; that in Trinity Term, 59 Geo. III., *Sewall* recovered judgment in the King's Bench in Upper Canada, against *Thomas Smyth*, the mortgagor mentioned in the bill, for £467 2s. 6d. debt, and £13 18s. costs; and that upon a writ of *fi. fa.* taken out in the 5th year of Geo. IV. upon that judgment, against the lands and tenements of *Thomas Smyth*, and delivered to the sheriff of the district of Johnstown (in which these lands are situated) the sheriff seized the lands and premises in the bill of complaint mentioned as belonging to the said *Thomas Smyth*, and on the 26th August, 1825, put them up to sale in the usual manner, and sold them to *Charles Jones*, as the purchaser at the said sale, for £105; that on the 27th of August, 1825, the sheriff made a deed under his seal of office, whereby he conveyed to *Charles Jones* in fee, as the highest bidder, the said land, so far as he lawfully might, and all his right, title, and interest, as sheriff, by virtue of the said writ of execution of and in the same; that the said *Charles Jones*, on the 30th

Judgment.

1846. July, 1857, in consideration of £800, to him paid by *Trueman Hicock* and *James Simpson*, granted, bargained, sold and released to them in fee, as tenants in common, all his right in the said land, to hold in proportion of two-thirds to *Hicock*, and one-third to *James Simpson*; that, on the 21st January, 1881, *Hicock*, in consideration of £500, transferred and assigned to *Jas. Simpson*, his right and interest in an undivided one-sixth part of the land, in addition to the one-third already held by *James Simpson*, thereby making them tenants in common in fee of equal moieties: that *Thos. Hicock*, on the 11th of April, 1881, in consideration of £1000, conveyed to *James Simpson* in fee another undivided sixth part of the land, whereby *James Simpson* became seised of two-thirds of the whole estate, *Hicock* continuing seised of the other one-third; that on the 2nd of May, 1881, *Hicock*, in consideration of £1000, conveyed all his estate and interest in the 400 acres of land to *Abel R. Ward* in fee; that on the 21st February, 1882, *James Simpson* and *Abel R. Ward*, then being seised of the whole estate as tenants in common, conveyed all their interest in the 400 acres of land to *William Simpson*, the then sole defendant in the suit, for £5000, to hold in fee simple; and the plea concluded by denying that the plaintiffs had any interest in the estate.

Judgment.

This plea came on to be argued before his honour the Vice-Chancellor, on the 30th July, 1841, when it was overruled with costs.

The defendant, on the 13th April, 1842, put in his answer to the bill; in which, among other things, he set forth that the purchase made by him from *Hicock* of the whole estate in the premises, was for the benefit of himself and of *Abel R. Ward*, the latter having agreed to hold one-third in common with him; that they afterwards made a partition, and thus became possessed of separate parts of the premises; that under the statute

8 Geo. IV. ch. 1, for the construction of the Rideau Canal, certain portions of the land have been taken for the use of the canal, and are become vested in her Majesty; that the land having become desirable for the site of a village, and believing himself to be seised of an absolute and indefeasible title in fee simple under the circumstances set forth in his answer, he laid out a village plot thereon, and has from time to time sold and leased village lots to persons, who have erected houses and made other improvements; and he specifies in a schedule annexed to his answer the particulars of all the sales and leases. He states further, that *Abel R. Ward* has made also many similar sales of lots from his portion of the land, of which he (*Simpson*) is unable to give the particulars; and, after setting forth facts upon which he relies as entitling him to hold his portion of the land free from any equity of redemption on the part of the plaintiffs, he insists that the several persons whose names are given by him, as having purchased or leased and improved portions of his part of the 400 acres, should be made defendants, and also *Abel R. Ward* and those claiming under him, and that her Majesty's Attorney General should be made a party in respect of the portions of the land set apart and held for the use of the Rideau Canal, and now vested in her Majesty.

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Judgment.

On the 24th of December, 1842, the respondents amended their bill, making *Abel R. Ward*, *Henry Glass*, *Patrick Tierney*, *William Brown*, *Arthur T. Ward*, *Henry Lake*, *Elijah W. Boyce*, and *Rufus Collins* parties. The amended bill sets forth the facts stated in the answer respecting the partition between *William Simpson* and *Abel R. Ward*, by deed made on the 5th June, 1834, and charges that *Simpson* had conveyed to persons named in a schedule annexed the village lots therein specified, being parts of the 400 acres; and that *Ward* had also disposed of other lots, of which the particulars were unknown to the respondents: that *Charles Jones*, *T. Hicock*, *James Simpson*, *Abel R.*

1846. *Ward, William Simpson*, and the several purchasers from *William Simpson* and *Abel R. Ward*, had notice of the mortgage when they acquired their interest; and that *William Simpson* and *Ward*, and the several purchasers from them, have been in possession of the mortgaged premises from the 5th June, 1834, and are still in possession.

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The bill prays :—

1st. An account of what is due on the mortgage, and of the rents and profits received by the appellants and others the purchasers of any of the said village lots so conveyed; and that the respondents might be allowed to redeem on paying the balance, if any be found due, and prays a re-conveyance.

Judgment. Or, 2ndly. Prays an account of rents and profits received by appellants, and that on payment of a proportionate part of what may be due on the mortgage, after deducting such rents and profits, they may be allowed to redeem so much of the premises as appellants are interested in, and that the same may be re-conveyed to them, and that any surplus of the rents and profits may be re-paid to them, without prejudice to their proceeding against the other purchasers of the said village lots, for the redemption of the same.

Or, 3rdly. That if, on taking the last mentioned account, anything shall be found due upon the mortgage, the respondents may, on paying such balance, be allowed to redeem such parts of the premises as the appellants are interested in, and that the same may be re-conveyed to them, or any surplus of the rents and profits paid to them; and that *W. Simpson* and *Abel R. Ward* may pay to the respondents the value of the residue of the mortgaged premises, and a compensation for the rents and profits thereof not accounted for, or the purchase moneys received in respect thereof, with

interest from the times of receiving the same, at the option of the respondents. 1846.

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Or, 4thly. That upon payment to *Simpson* and *Abel R. Ward* of any balance due on the mortgage, after deducting rents and profits received by them, the respondents may be admitted to redeem such parts of the premises as those two "continue interested in," and to have the same re-conveyed—and any surplus of rents and profits to be paid to the respondents; and that they may pay to respondents the value of the residue of the mortgaged premises, and a compensation for the rents and profits not accounted for, or the purchase moneys received in respect thereof with interest, at the option of the respondents; concluding with a prayer for general relief.

The schedule referred to in the bill contains the names of twenty-nine persons as purchasers (if I understood it correctly) of village lots, some of them holding more than one. Ten of these lots are stated in it to have been "conveyed:" whether the purchase money may have been paid on those, or the whole or any part of the price of those not conveyed, does not appear. Several lots are stated as having been leased; but for what periods, or on what terms, is not stated. Some are set down merely as being occupied by different persons named; others, as having houses built upon them. Two lots are set down as having been conveyed to trustees for a Presbyterian church, and one to trustees for a Roman Catholic church. Judgment.

The appellant *Glass* stands in the schedule as the purchaser of a lot conveyed; *Tierney*, of a lot sold but not conveyed; *Brown*, of two lots sold, but not conveyed; *Arthur J. Ward*, the same; *Lake*, the same; *Boyce*, as purchaser of one lot, not conveyed; *Collins*, the same.

In all, sixty-two village lots are mentioned as having

1846. been sold and conveyed, or sold and not conveyed, or leased, or merely built upon, or occupied.

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Smyth.*

And among the purchasers who are not made parties, are some who are stated in the schedule to have received their conveyances, and some also of each of the other descriptions. The bill contains no statement accounting for the not making many of these persons parties, and it does not appear why any of those who have been made defendants in the amended bill should have been made parties more than some of those who have been omitted.

On the 25th March, 1848, *William Simpson* put in a demurrer to this amended bill, for want of parties, which being argued before his Honour the Vice-Chancellor, on the 11th July, was over-ruled.

Judgment. The defendants, *Abel R. Ward*, *W. Simpson*, and *Glass*, severally answered the amended bill, and *Lake*, *Boyce*, and *Collins* answered jointly.

On the 4th of June, 1845, after evidence had been taken, the cause came on to be heard, when his Honour the Vice-Chancellor made a decree in substance as follows: that an account be taken of the money due on the mortgage, and of the present value of the improvements made by the appellants on the lands in their possession, or claimed by them; that an occupation ground rent be set on such lands by the master, for the time they or their tenants have occupied, and also on the lands sold, while they were so occupied before sale; that an account be taken of the mortgaged lands sold, and of the moneys received by the appellants on account of such sales, and interest calculated thereon; that the mortgage money and interest, and the value of the improvements, be set against the ground rent and purchase moneys received by the appellants, with interest, and balance paid by one party to the other accordingly; that the appellants shall convey to the respondents such

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of the mortgaged lands as continue vested in them; that appellants shall assign to respondents any contracts which they shall have made for the sale of any of the mortgaged lands remaining open and unperformed; that the mortgage money and interest shall be divided rateably among the appellants in proportion; and that each shall receive the value of his own improvements, after deducting such ground rent as aforesaid in respect of the lands occupied by himself or his tenants, and *such part of the purchase moneys as he has received, with the interest thereon.* The master to make all just allowances.

1846.

Simpson
v.
Smith.

From this decree the defendants in the cause below appeal; and the orders of his Honour the Vice-Chancellor, overruling the plea and demurrer, are also appealed from.

The plea rests the defence upon the ground, that whatever interest the mortgagor *Smith* retained after the mortgage, was divested by the sheriff's sale under the *fi. fa.*, and that his devisees have consequently nothing to redeem. That is a point so inseparable from the merits of the case, that it is impossible the respondents could have a decree in their favour, if we should be of opinion that the equity of redemption passed by the sheriff's deed to Mr. *Jones*; but when we are asked to entertain the question upon an appeal against the Vice-Chancellor's order overruling the plea, the first point to be considered is, whether *Simpson* is in a situation to appeal from that order. I apprehend he is not. If, in case of his having promptly appealed from the order overruling his plea, he might nevertheless have been compelled to answer before the appeal could be disposed of, then it would have been contrary to reason to hold, that by afterwards answering he had waived his appeal. But he would not have found himself in that situation. It seems to have been at one time a doubtful question in England, whether upon an appeal in an equity suit, the

Judgment.

1846. proceedings in the court appealed from were suspended by the appeal; and many years ago the House of Lords appointed a committee to consider and report upon that point.

Simpson
v.
Smyth.

It appeared obvious to the committee, upon investigating the subject, that many great inconveniences must follow if the parties could not be restrained from proceeding in the cause as a matter of course, notwithstanding the appeal; and that, on the other hand, injustice as well as inconvenience might follow, if all proceedings in the cause in the court below must be held to be absolutely suspended, so that no step could be taken under any circumstances or for any purpose.

Upon the report of the committee, the principle was adopted, that an appeal should be considered as not tying up the party who has succeeded below from proceeding, but that it should be left to the appealing party, if he should desire to restrain proceedings, to apply for that purpose. And this seems to be the settled practice at the present day. It seems also to be required (though that was not contemplated at the time the rule was resolved upon) that the application should be made in the first instance to the court below.

Judgment.

We must suppose then, here, that if *Simpson* had appealed at once from the order overruling his plea, he would not have been compelled to answer while the appeal was pending; and by voluntarily answering, and stating in his answer the same matter which he had made the ground of his plea, he submitted, I think, to the order overruling his plea, and waived his right of appeal from it. (a) If I am in error in this point, on which I am not so competent to judge as his Honour the Vice-Chancellor, the error would not be material so far as the plea is concerned; for it is equally my opinion that the plea was properly disposed of, and that the appeal against the

(a) *Wood v. Milner*, 1 Jac. & W. 686; *The King of Spain v. Machado*, 4 Russell, 560.

order should on that ground also be dismissed. The Vice-Chancellor, no doubt, was aware of the doctrine constantly maintained in the common law courts in this country, that an equity of redemption is not such an interest as can be sold under a writ of *fieri facias*; not being the subject of execution upon legal process. And if he had decided otherwise than he did, it would have been such a departure from the maxim that "equity follows the law," as might have led to inconvenient consequences, and indeed to great confusion. I take it to have been determined in the Court of King's Bench, and well understood from an early period that the mortgagor of an estate, especially after the conveyance has become absolute in law by his failure in performing the condition, has no interest that can be taken and sold in execution under a *fi. fa.*, either at the suit of the mortgagee or of any other person.

1846.

Simpson
v.
Smyth.

That certainly was taken to be a point established before I came to the bench, which is seventeen years ago, and I believe I might even say, before I came to the bar.

Judgment.

It was determined at a time when the decisions of the court were not reported, and the grounds therefore upon which the judges of that day came to the conclusion do not appear. Whenever the point has come up of late years, the law has been assumed to be as I have stated, and there has been little or no argument upon it.

I think it very probable that the question has never before been so elaborately discussed in this country, as it has been before us on the present occasion, though I do not suppose that any of those considerations which must have been decisive of the question had escaped attention hitherto. They must inevitably, I think, have presented themselves.

We may take it for granted that the foundation of the

1848. decision has been the principle so broadly laid down by the Court of Common Pleas in England, in *Preston v. Christmas*, (a) "that an equity of redemption is nothing at all in the eye of the law;" though certainly in some previous cases it had been considered so far at least of value, that the release of such an equity had been held to be a sufficient consideration to support an assumption. (b) This is not inconsistent, however, with the doctrine stated in *Preston v. Christmas*. Much must of course depend upon the purpose for which, and the proceeding in which a court of law may be called upon to recognise its value. No doubt it is an interest, though not a legal interest, and it may be of actual value, though it may have no legal value. It is no argument to say that an equity of redemption may be devised, for an equitable interest is as much devisable as a legal interest; and we could not maintain that whatever interest might pass by a devise could be seized under a common law execution, for that would be holding what no one would think of contending for, namely, that an estate which a debtor has merely contracted for, may be sold as his under a *fi. fa.*, for unquestionably he has an equitable freehold which might be devised. The plea states that upon the judgment against *Thomas Smyth*, a writ of *fi. facias* issued against his "lands and tenements," under which all his interest in these mortgaged lands was sold. If at the time these lands were the lands or tenements of *Thomas Smyth*, then the writ would attach upon them; or rather perhaps I should say, if he had a legal estate in them higher than a mere chattel interest, such legal estate could have been sold under the writ. But it is admitted on all hands that his interest was a purely equitable one; for if he had an interest of any kind remaining in him after the mortgage and after his default, it was nothing more than a right to pursue a remedy in a court of equity at some future day, if such a court should ever be established in this country, there

Judgment.

(a) 2 Wilson, 86.

(b) *Wells v. Wells*, 1 Lev. 278; *Thorpe v. Thorpe*, 2 Ld. Ray. 663.

being no such court in fact at the time, and no certainty that there ever would be. 1846.

Simpson
v.
Smyth.

Assuming that we are now at liberty to go into this as an open question, it has been contended that the cases of *Lyster v. Dolland*, (a) and of *Scott v. Scholey et al.*, do not in the nature of things apply, first, because they were mortgages made of terms for years only, and not of a freehold estate, and therefore the equity of redemption in those cases could not be extended as trust estates under the 10th section of the Statute of Frauds, because the trust estates which are by that statute made extendible, are intended to be trust estates of freehold only, and not leasehold trust interests; and secondly, because the question in these cases in England came up on the effect of an execution by *elegit*; now it is quite obvious that an equity of redemption could never be extended upon an *elegit*; for the effect of that would be to take the estate out of the actual possession of the mortgagee, which would destroy the effect of his security, and would be quite inconsistent with the object of the mortgage and the intention of the parties. No doubt that is so; and that it may therefore be said with truth, that some of the grounds on which it has been held in England, that an equity of redemption in a term for years cannot be extended as a trust estate under the Statute of Frauds, do not apply to the question whether an equity of redemption in a freehold estate in Upper Canada can be sold there (not extended) under the effect of the British Statute, 5 Geo. II., ch. 7, which allows real estate in the colonies to be sold in like manner as goods and chattels for the payment of debts. But it is nevertheless quite impossible, I think, laying such grounds on one side, that a court of common law in this province could have held consistently with those decisions and with the principles upheld by them, and particularly by Lord *Ellenborough's* judgment in *Scott v. Scholey*, that

Judgment.

(a) 2 Br. C. C. 498; S. C. 1 Ves. Jr. 431.

1846. an equity of redemption in a freehold estate could be sold in this country under a *fi. fa.* The Statute of Frauds in England, which allows trust estates to be extended in execution, has been taken to be confined to cases of naked trusts, where the whole beneficial interest in the estate is in the *cestui que* trust; that is, to the simple case of an estate held by A. B. in trust for C. D.; and an equity of redemption, which is no trust created by contract of parties, but a mere right to pursue a remedy extended by the indulgence of a court of equity, is held not to be a trust estate that can be at all within the contemplation of that statute, and so not an estate that can be seized and extended under the 10th clause. The only statutory provision then in the law of England in force here, which has in terms subjected equitable interests to common law process of execution, does clearly not apply to the case, and this is admitted; and there is therefore not only the argument that an authority to extend such an estate under that statute by *elegit*, would not be an authority at any rate to sell it under a *fi. fa.*; but there is the further argument, that the only enactment by which the law of Eng^land has subjected trust estates in England to common law executions of any kind at the suit of a subject, has never been admitted to apply to an equity of redemption. And indeed the reasons why an equity of redemption should not be liable to be sold under a *fi. fa.* seem so strong as to be almost irresistible.

Judgment.

They are clearly brought under view in the argument of the case of *Scott v. Scholey*, and are strongly put by the court as grounds of their decision. It is true, indeed, that it has been decided in England; and we have followed the decision here, that the estate of the mortgagee cannot be sold upon a *fi. fa.*, because in reality the extent of his interest is only to hold the estate till he is satisfied the debt, which in general is secured by a bond taken at the same time: and the effect of selling, as his, the only substantial interest which he really does hold,

would be to separate the securities, and place the estate in the hands of one person, while the debt would remain in another.

1846.

Simpson
v.
Smyth.

It does seem a singular state of the law, under which an estate can exist, not subject to execution, as being no legal property of any one; not liable under an execution against the mortgagor, because it is held not to be his property in the eye of the law; not under an execution against the mortgagee, because he is not really and in substance the owner, but only in form, as a means of compelling payment of a debt secured upon it, which is his only valuable interest in the land. But this only shews the more clearly, that it is in equity alone that the remedy can be properly and conveniently sought, with safety to the claims and interests of all parties. A purchaser of an equity of redemption under a *fi. fa.* attended as the right is with equities of a peculiar kind, arising from circumstances which neither he nor the sheriff can know, and over which the court of law issuing the process can have no control, would be in a most unsatisfactory position; and it would be highly to the prejudice of the mortgagor, that his equitable estate should be forced from him under a legal process, at the price that a stranger might think it prudent to give for it under such disadvantage. The judgment creditor has his proper remedy in equity, for he is admitted there to be in a position to redeem, by paying off the incumbrance.

Judgment.

Of course, it was never reasonably to be assumed, without argument, that the statute 5 Geo. II., ch. 7, which I have already referred to, did place us in so different a position in regard to this question, that it ought to lead to a contrary decision, respecting the right to sell the equitable estate under an execution.

I have a distinct recollection of hearing it more than once relied upon for that purpose; but this court has

1840. *Almopon v. Smyth.* never held that there was any thing in that act, that could warrant them in confounding legal and equitable remedies, by holding that under a *fi. fa.* against the lands and tenements of a party, land could be sold as his, of which the legal estate was in another. Whether we regard an equity of redemption as "*lands, hereditaments,*" or "*real estate,*" which words are used in the act, it must by the terms of the act, "*belong to the person indebted,*" before it can be made liable to the payment of his debts. In the view of a court of law, an equity of redemption is nothing "*belonging to*" the debtor which it can recognise or is authorised to deal with, for the law looks only to the legal estate. In the view of equity it is an interest, and one to which it can give effect, and in such a manner as to suit the just claims of all; and therefore when the same act, after making real estates liable for the payment of debts, provides that they shall be "*subject to the like remedies,*" proceedings and process in *any court of law or equity* for seising, extending, selling, or disposing of them, as personal estates are subject to, in the same colonies, for payment of debts;" the legislature seems to have preserved the subject from confusion by sending parties either to law, or equity, according to the nature of the interest to be made liable.

Judgment.

And with reference to another part of the same clause an equity of redemption doubtless, by the law of England descends to the heir, and is liable in his hands to the satisfaction of specialty debts; but nevertheless it was never liable to legal process of execution—it could be reached only in equity.

If the question were now before us as an undecided point, there were arguments not ingeniously merely, but very forcibly put, upon the construction of this statute, and upon the remedy given by 25 Geo. III., ch. 35, for the sale, not only of lands, &c., but "*of the right and interest in lands*" belonging to debtors to the Crown, and

upon the sale of equities of redemption under that statute, which would all require to be considered and carefully stated, and disposed of. I do not enter upon these now, because I hold that upon a question of this kind, we are bound by the state of the law as we find it settled by former decisions; and for the additional reasons, that as regards the plea itself, I think any appeal is waived; and indeed in the view which I take of the case upon the merits, the effect would be the same, whether I thought the equity of redemption was in this case bound by the sale on the *fi. fa.*, or not.

1846.

Simpson
v.
Smyth.

I will only add, therefore, that it is my present impression, after hearing an argument which has thrown much new light upon the question, and which probably indeed has placed it in every light in which it is capable of being placed, that the courts of law in this country, when that question was first presented to them, could not, in the face of those principles of English law, and decisions of English courts, which were unquestionably binding upon them, have held otherwise than they did, unless that 5 Geo. II., ch. 7, had the effect of placing the subject upon such totally different ground, as to subject such an equitable interest in the colonies to legal process in opposition to the principles established in England. I am not yet convinced that our courts could properly have ascribed such an effect to that statute, and at all events they have not done so, but have on the contrary always held the sale of an equity of redemption under a *fi. fa.* as a wholly insignificant act, refusing to recognise it as having any binding effect upon the title. The question, though it has come up here in an equitable suit, is a strictly legal question, looking at the purpose for which it is entertained. If twenty or thirty years ago, and after the first decision had been made, the judges of this court had upon more mature deliberation changed their opinion, they were no doubt at liberty to overrule their first impression; but I consider it to have become the settled doctrine of the courts

Judgment.

1846. of common law, consistently maintained in this country
 Simpson v. Smyth. for a great number of years, that such a sale as was
 made in this case transfers nothing. We cannot tell
 how many cases may have occurred, in which mortgagors,
 whose interests have been attempted to be bound by such
 sales under execution, may have afterwards sold their
 interest to purchasers for value—both parties relying
 upon the known doctrines often recognised and stated by
 the court. In questions of this kind, relating to rights
 of property, and especially real property, it is always
 held to be incumbent on the courts to adhere to adjudged
 cases. If these seem to lead to inconvenient or even
 absurd consequences, as they have been sometimes
 admitted to do, still it is considered right, for the sake
 of certainty, to abide by the generally known and
 understood rule, leaving it to the legislature, if they
 shall think fit, to alter it, rather than to shake confidence
 in the state of the law, and produce uncertainty in the
 dealing with and advising upon titles, by departing at
 pleasure from established decisions, and giving effect
 from time to time to the varying opinions of different
 judges upon the same points.

Judgment.

It would certainly seem strange here if, when the
 Vice-Chancellor has decided in accordance with the con-
 stant course of the Queen's Bench, in refusing to give
 effect to a sale of an equity of redemption under a *fi. fa.*
 his decision should be reversed by the judges of the same
 common law court sitting in appeal from his judgment.
 I think, therefore, that the appeal from the order over-
 ruling the plea should be dismissed with costs, upon the
 double ground that the right of appeal as to the plea
 was waived, and that at any rate the plea was rightly
 overruled, considering the manner in which attempts to
 sell equities of redemption, by common law process, have
 been hitherto treated by the Court of Queen's Bench in
 this country.

If it be thought desirable that recourse should be had

by a creditor against this particular description of interest, otherwise than through a court of equity, it must be left to the legislature, I think, to change what I regard as being now the law of Upper Canada on this point; but it seems to me that the matter would require to be very well considered before any such change is ventured upon.

1846.

Simpson
v.
Smyth.

The order overruling the demurrer put in by *William Simpson*, is the next matter appealed from; and, in respect to this order also, I think the right of appeal was waived by the defendant afterwards putting in an answer: it seems to rest upon the same point of practice in that respect as the plea. The cases of *Wood v. Milner*, and of the *King of Spain v. Machado*, are in point. In the former, the court, in order to prevent the party from being concluded by answering entertained an application from him to extend the time for answering; and they made it a condition for his protection, that he should not be prejudiced by making the application, on the ground that it was a waiver of his appeal against the demurrer.

Judgment.

If this defendant had been in a situation to insist on his demurrer for want of parties, my doubt would have been whether the mere circumstance that relief is prayed for in one shape in the bill, by which the absent parties cannot be affected in interest, would be an answer to the objection. It is averred in the amended bill, that all the purchasers under *Simpson* and *Ward* respectively had notice of the state of the title. They are not so numerous (so far as the facts appear in the first answer to the amended bill) as to bring the case within the reason of any decision, where inconvenience alone may have been received as a ground for not bringing into court all who have so direct and clear an interest. Nor could the necessity here be held to be dispensed with, upon the principle that those who are made defendants can be looked upon as representing others who

1846. are absent, either by being appointed to represent them, or from the nature of the relative situation of the parties. Nor does the bill contain any statement of reasons or impediments, on account of which the respondents have not conformed to the general course of the court.

Simpson
v.
Gmyth.

Under such circumstances, it seems to be conceded, that no decree could properly be made, which would be consistent with the relief prayed for in the three first alternatives of the prayer in the bill; but it is contended that the fourth alternative involves nothing by which any of the purchasers not made defendants in the bill could be affected, if indeed the same could not be said of the relief prayed in the third alternative.

We could only of course determine the question by what appears on *Simpson's* first answer, and the amended bill, not noticing the evidence or the decree which has in fact been made; because these are subsequent to the demurrer. And if it could be said with absolute certainty that a decree made in strict accordance with the fourth alternative, could not affect any but the appellants; and moreover, that sustaining the bill in that shape, would not tend to unnecessary litigation, by occasioning a multiplicity of suits, when one could have been made to answer; then it would seem reasonable that the party might be allowed to proceed against these appellants alone. But there is nothing in the bill by which the respondents do in terms preclude themselves from seeking redemption hereafter, in respect to the holders of other portions of the mortgaged estate. They do indeed propose to take the purchase money received upon sales of such parts as *Simpson* and *Ward* "do not continue interested in;" and they only ask to redeem such portions of the mortgaged premises as *Simpson* and *Ward* "still continue interested in;" that is, they only now pray to be allowed to redeem as to such portions. All that can be said of this

Judgment.

is, that having asked for the purchase money, if they should be decreed it, they can never afterwards be allowed to redeem the land; but what has been in fact done upon their prayer would have to be shewn hereafter if they should, as they might, attempt to redeem against these other purchasers.

1846.

*Althoon
v.
Smith.*

They do not expressly relinquish their right, nor consent to forego it in direct terms. And besides, the respondents by their bill desire relief in any of the four ways suggested; not agreeing to take one and waive the others, but reserving the right of course to contend at the hearing for one mode of relief as well as for the other; and they would go down to the hearing, as we must suppose, meaning to press most earnestly for that which would give them the fullest measure of relief; for the first alternative if that can be got, if not, for the second, and so on. It is not the case of a plaintiff, on the hearing of the cause, proposing to take a decree which shall save the interest of all absent parties. The question upon the demurrer is, whether a plaintiff can be allowed to go down to the hearing, and to take evidence before the hearing, upon a bill which certainly does pray redemption against a number of parties who are not made defendants in the cause. Have they not an interest in being heard, for fear the court may, though they need not, make a decree which may affect their interest? And though such decree might not in fact be suffered to affect them, on account of their not being made parties, yet the course of the court requires that they shall have before them all whose presence may be necessary for enabling the court to deal finally, effectually, and justly, with all the interests involved. The plaintiffs, as it seems to me, though I express the opinion with very little confidence, from not being conversant in equity proceedings, could hardly be allowed to say in answer to the demurrer, "We will at the hearing take a decree in such a shape as that the absent parties can have no concern in it." The court, I think, must say to

Judgment.

1846. them, "You should have framed your bill and brought
 your suit in such a manner that the court might deal
 with it as justice and their rules require. Whereas here,
 relinquishing nothing, you have asked for several things
 which we cannot grant you in the absence of parties
 who are by your own shewing interested in opposing
 your claim. (a) And you do not limit your prayer so
 that we can say, we should be stopping short, with your
 assent, of granting all that you are claiming." The
 decisions in England seem to support this view. And
 besides, I do not see that we could hold that the relief,
 in the narrowest shape in which it has been prayed, is
 certainly not open to the objection of want of parties.
 The respondents pray to redeem all the portions of the
 mortgaged premises which *Ward and Simpson* "continue
 interested in." They "continue interested" in such parts
 as they have sold but not conveyed, on account of the
 purchase money being unpaid, and in such portions as
 they have leased. The schedule which forms part of the
 bill shews that they have leased several lots to persons
 who are named, and have sold lots to others, which are
 not yet conveyed. I do not assume that it was neces-
 sary the lessees should have been made parties, but
 the purchasers of lots not conveyed have *prima facie*
 an equitable freehold; and I am not sure that we
 should be safe in assuming that they must not be
 made parties to a bill which seeks to redeem their
 portions.

Judgment.

It has been urged that if on these, or any other
 grounds, the bill is defective for want of parties, such an
 objection amounts in effect to a denial of jurisdiction
 over the case in its present shape, and is an objection
 too substantial to be waived by any step which may be
 taken by those who are in fact made defendants; for
 that it might be made by any one, even as *amicus curiæ*.
 I have no doubt that either the court upon the hearing,
 or this court upon appeal, might order the cause to stand

(a) *Richardson v. Hastings*, 7 Beavan, 306, and *Lidbetter v. Long*.

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over till the defect should be supplied. But as a demurrer would not be allowed to be filed by an *amicus curiæ* having no connexion with the cause, (a) so I take it that the objection, so far as it depends upon the demurrer merely, is at an end, when the demurrer being overruled, the defendant, instead of appealing against the order, 'submits to it, and puts in his answer. I think the appeal as to that order must, on that ground, be dismissed with costs. (b)

1846.

Simpson
v.
Smyth.

The substantial question in this case upon the merits, and that to which the counsel on both sides chiefly applied themselves is, whether upon the facts proved the respondents ought to be allowed to redeem as to any part of the premises, or whether they can and ought to be refused the privilege of redemption, which they can claim as a right. The case, in that view of it, has been argued with remarkable ability, and such a degree of talent and industry has been shewn on both sides as does great credit to the gentlemen employed. The question is one highly interesting in its nature, more especially from the application which the decision may have in other cases which are known, and probably in very many that have not yet engaged attention. The value, too, of the interests involved in the case itself is very large; certainly not less than many thousand pounds, taking the desired redemption in the most limited extent that has been suggested.

Judgment.

We must look upon the case, I think, as turning upon that provision in our own statute book, which has been

(a) Windsor v. Windsor, 1 Dickens, 707; Holdsworth v. Hol. worth, ib. 799.

(b) As regards the costs of the appeal from the order overruling the demurrer, it was suggested by the counsel for the appellants when the judgment of the court was given, that the respondents ought to have petitioned against the appeal, and not consented to go to argument upon it, and that not having insisted upon the waiver, they have no claim to the costs of the appeal, which they have without necessity suffered to be incurred. This court having so decided under the like circumstances in the case of Smith & Crooks v. Rhodes, the court followed that decision here, and the appeal was in fact dismissed without costs.

1846. made the main ground of the argument on the part of the defendants, I mean the 11th clause of the 7th Wm. IV., ch. 2; for independently of that provision, it did not seem to be put with much confidence, that the right to redeem could be denied; or rather, I should say, it did not seem to be very earnestly contended, that taking such a case to have arisen in England, there is any thing in the mere conduct of the parties, that upon the ground of acquiescence or otherwise, could have been held to have extinguished the equity of redemption, however strongly it might have operated in regard to compensation.

Simpson
v.
Smyth.

Judgment. There are some points in the evidence, however, bearing upon that view of the subject, which I think would be felt to call for attentive consideration, and for a much more careful examination of adjudged cases than it has been in my power to make since the argument, if the case were to be taken up on that ground alone. Nothing was cited on the argument that appeared to me to go the length of justifying the withholding the redemption on such grounds as are here shewn, if all that has taken place here had taken place in England, where it would have been open to the parties, during the whole period, to take such equitable proceedings as their view of their own interest might have prompted them to. To determine what it is just to do, considering the state of things which has existed in Upper Canada at and from the time when this mortgage was made, and considering also the provision which the legislature has thought it reasonable to make on account of that state of things, is the question to which I shall think it more proper to confine myself. His honour the Vice-Chancellor has intimated that having been given plainly to understand, while the case was before him, that an appeal would follow whatever course he might take in disposing of the case on the merits, he did not give the same anxious consideration to it, as he must otherwise have done, on account of the great interests involved. We might probably look upon it as

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almost equally certain, that our judgment upon appeal will not be acquiesced in by the losing party, which ever it may be. And, indeed, though we would unwillingly see a suitor in any hopeless case incur the very formidable expense which unfortunately seems inseparable from an appeal to the Privy Council, notwithstanding the late improvements in that appellate jurisdiction, yet one cannot but desire that the opinions which we may form upon the question now submitted to us should be reviewed by a higher court, for the sake of others who may be interested in it, as well as of the parties now before us. If this should happen, there are some peculiarities in the proceedings which will probably be looked upon in England as inconvenient departures from the ordinary course of practice in equity, particularly in regard to the taking and publication of evidence, according to the practice which has obtained under our Chancery Act. The appellants complain of this as having subjected them to great disadvantage in regard to the evidence given by *Covell*, one of the respondents' witnesses; who being (as it is alleged) a man of reckless character and notoriously intemperate habits, and having, as appears by his evidence, a direct interest sufficient at least to occasion a strong bias, has been procured, as they complain, to give answers deliberately framed and contrived to support the respondents' case in all points, and to repel the defence set up by the other side, after the opportunities which the method of taking evidence under our statute admits of, of knowing all that had been proved on the part of the defence. With regard to the character and habits of the witness nothing was proved, and therefore no allowance can be made on that score; and his evidence must be estimated by our means of judging of the probability of its truth, upon the face of his statements, and by a comparison with the testimony of the other witnesses, to which it is certainly on some points very much opposed.

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Judgment.

His honour the Vice-Chancellor, as I understand from

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him, decreed according to the prevailing impression on his mind, that the Chancery Act gave him no power, under any circumstances, to withhold redemption altogether, when it would not, under the same circumstances, be withheld in England; but merely to restrict it upon his view of the facts, by imposing such terms as he should think just. He accordingly has allowed redemption; and, under his view of all the facts proved, and in the exercise of the discretion which the statute gives him, he has framed such a decree as he believed would meet the justice of the case. This decree is appealed from, and various exceptions have been taken to it, which regard only its particular terms. They are complained of as being, several of them, repugnant and inconsistent as well as unreasonable, and not calculated to meet the justice of the case, admitting that a decree for redemption was inevitable. But the defendants do not merely complain of the terms of the decree; they appeal against it on the grounds, first, that the Court of Chancery had the power, under the act, to refuse redemption altogether; and, secondly, that the circumstances of this case render it proper that redemption should be refused. The respondents contend against both these positions. My judgment is with the appellants on both points—without hesitation as regards the first, and after weighing as carefully as I am able, all the evidence which must be considered in determining the second.

I cannot prevail upon myself to doubt that the eleventh clause of our Chancery Act gives to the Court of Chancery a power over the right of redemption in all cases coming within that clause, and that its operation is not to be confined to the mere adjustment of compensation, or other conditions. If its language should seem to admit of doubt in this respect, (which it does not appear to me to do,) a short reference to circumstances which we know, and must recognise, may help to explain it. The civil government of Upper Canada was organised 1792. The legislature first sat in

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that year, and by their first act they provided, that "in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as the rule for the decision of the same." The trial by jury was next established, and a court of civil and criminal jurisdiction created, with the like jurisdiction as the superior common law courts in England. Courts of Request were organised for the trial of small causes, on the same principle as the courts of conscience in England; and these were not held to the strict rules of the common law; but with this exception, if it can be called one, there was absolutely no court whatever authorised to proceed otherwise than according to the course of the common law. No court of equity was created, and no provision made for the exercise of an equitable jurisdiction, in regard to any one matter that belongs peculiarly to equity, nor any assurance held out by the legislature while they were introducing the English law, in the year 1792, nor for more than thirty years afterwards, that there ever would be a court in Upper Canada authorised to administer what is in England called equity. In the year 1834 (so far as I am aware) the first allusion was made in our statute-book to a mortgagor's right to redeem. In ch. 16 of the statutes of that year, a short act was passed, for giving to a certificate of payment of the mortgage money, when registered in the county register, all the effect of a re-conveyance of the estate. And it was thought prudent to add a proviso, "that such certificate, if given after the expiration of the period within which *the mortgagor had a right in equity to redeem*, shall not have the effect of defeating any title other than a title remaining vested in the mortgagee, or his heirs, *executors and administrators*;" by which the legislature seem to have apprehended, that otherwise a mortgagee, after acquiring an estate which ought to be held absolute in equity as well as at law, and after transferring such estate to some other party, might, by receiving the mortgage money and giving a certificate, defeat the estate of the purchaser. In the same

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v.
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Judgment.

1846. year, the legislature passed an act, 4 Wm. IV., ch. 1, adopting, with some modifications, many of the improvements in the law of real property, which had lately been made in England, upon the recommendation of commissioners, and in this act there is mention made in several clauses of equitable interests and estates, as distinct from legal estates, and provisions are made in respect to each, corresponding with those which had been introduced in England. Indeed, in 1827 or 1828, there had been discussions in the legislature and a movement made by the government towards creating an equitable jurisdiction; but nothing was completed, and the design was dropped, till it was taken up again in 1887. In the Canadian Real Property Act, just referred to, (a) the limitation of twenty years is adopted with regard to any suits in equity for the recovery of land or rent, as well as in suits *at law*, with a proviso, such as the English statute contains, that this enactment shall not interfere "with any rule or jurisdiction of courts of equity, in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the act." The clause in the English Act, respecting the limitation of time binding upon the mortgagor, is very closely followed; and at the end of the 48rd clause, in which provision is made limiting the time for suing at law or in equity for any mortgage-money, or for any legacy, there is this proviso, which though out of place as regards part of the subject matter, is not the less binding: "provided always, that in respect to persons now entitled to an equity of redemption, or to any legacy, the right to bring an action, or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, until the expiration of five years from the time that an equitable jurisdiction shall be established in this province, and in the exercise of its powers; provided that shall happen within ten years from the passing of this act."

Judgment.

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(a) 82nd clause.

If no such court should be established within that period, it would seem that the legislature were willing that mere lapse of time should bar the mortgagor, though he could have had no remedy open to him in equity, in any case where, being out of possession, it had become necessary for him to sue for redemption.

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Thus, then, with the law of England introduced as the rule of decision in 1792, when our tribunals began to be erected—with no equitable jurisdiction existing—with no allusion in any law of the province, before the year 1834, to any such thing as an equity of redemption—and with such allusions, in and after that year, to that equitable interest, and to mortgages, as I have mentioned, and with no other—the legislature, in the year 1837, passed the Chancery Act, 7 Will. IV., ch. 2, which for the first time gave the means of enforcing equitable rights in Upper Canada, for any purpose, or to any extent. This act, in its second clause, conferred upon the court to be created, and in which a vice-chancellor is to preside, (the governor being chancellor,) the same power and authority as are possessed by the Court of Chancery in England, "*in all matters relating to mortgages;*" and, in the same general terms, they gave the same power and control as are exercised by the Court of Chancery in England, over every subject, as I believe, which the system of equity embraces, enumerating expressly cases of fraud, trusts, dower, specific performance, &c. But in regard to mortgages, and to that head of relief only, the legislature seems not to have felt it safe to commit the jurisdiction in such extensive terms, without accompanying it with the special and precise provision which has given rise to the question we are now considering, and which is contained in the following (11th) clause:

Judgment.

"And whereas the law of England was at an early period introduced into this province, and has continued

1846. *Simpson v. Smyth.* to be the rule of decision in all matters of controversy relative to property and civil rights; while at the same time, from the want of an equitable jurisdiction, it has not been in the power of mortgagees to foreclose, and mortgagors, being out of possession, have been unable to avail themselves of their equity of redemption; and, in consequence of the want of those remedies, the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be found to be attended with peculiar equitable considerations, *as well in regard to compensation for improvements, as in respect to the right to redeem*, depending on the circumstances of each case; and a strict application of the rules established in England, might be attended with injustice; be it therefore enacted, &c., that the Vice-Chancellor of the said court shall have power and authority, *in all cases of mortgage*, where, before the passing of this act, the estate has become absolute in law, by failure in performing the condition, to make such order or decree *in respect to foreclosure or redemption*, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to him just and reasonable under all the circumstances of the case; *subject, however, to the appeal provided by this act.*"

Judgment.

It was provided generally by the act, that appeals shall lie from the order and decrees of the court, to the Governor and Council of the province, together with the judges of the Court of King's Bench; but it seems as if the legislature, feeling that they were vesting by this clause a most extensive discretion in the Vice-Chancellor, thought it well to guard it by making it *expressly* subject to appeal, in order that it might not be supposed that the principle was to be applied to this case, which is to a great extent recognised in regard to other tribunals, that the exercise of a mere discretionary power conferred upon a court, or even upon an individual

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judge, is not subject to be reviewed, there being no precise standard of right or wrong by which it can be tried.

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Hampson
v.
Smith.

When the legislature were first dealing with the subject of mortgages, in 1884, and were imposing limitations of time in order to quiet titles and claims, they naturally enough thought it sufficient, and at the same time incumbent upon them, to take care that they did not close the door absolutely against any equitable relief to the mortgagor, under whatever circumstances of hardship or injustice, by making time a bar, while for want of a tribunal, he never had had the means of applying for a remedy only equitable in its nature; they therefore wisely avoided to prejudge cases that had never been heard, by keeping open the claims of parties till they could be made known to a court competent to deal with them. If they had not done this, they would have been prejudicing the position of mortgagors to a very dangerous extent by the statute which they were passing, for they were then for the first time imposing a limitation of time, and making it an absolute bar, and they were letting the time run during a period when a disability existed, which more than all others had a claim to consideration. Their proviso had merely the effect of keeping the subject open without prejudice, till the legislature should apply themselves to the erection of a court of equity, if they should at any time do so; and when the legislature came to take up the subject in 1887, they were evidently fully aware of the necessity of proceeding with great circumspection.

Judgment.

It may be thought, that they might have laid down some general rule for protecting mortgagors in a particular class of cases; as for instance, that where an ejectment had been brought by the mortgagee, and the mortgagor had not availed himself of the statute 7 Geo. II., ch 20, by applying to stop proceedings on paying the debt and costs; or when, as in this case, the interest

1846. of the mortgagor had been knowingly suffered by him to be sold in execution, it should be deemed equivalent to a foreclosure; but either of these rules might in some cases have operated most unjustly. The 7 Geo. II. can only be used in cases where there are no accounts to be investigated, and no disputed payment, when nothing is to be done, but for the master to make a computation upon the face of the mortgage. With regard to sale in execution, it would have been strange if the legislature, taking up the subject in 1837, had placed a particular class of mortgagees on so favourable a footing as compared with others, merely because they had adopted a proceeding which the only court of justice then in the country had always held to have been illegal and inoperative; and besides, either of these courses would have been, in effect, allowing mortgagees to foreclose at their pleasure, without the intervention of any court, without any regard to the disproportion which might in many cases have existed between the value of the estate and the sum secured on it, even at the time of the security being given, and without making allowance for any of those equitable circumstances which sometimes lead courts of equity to enlarge the time appointed for foreclosure, or even to open the foreclosure long after the decree. To have adopted any number of years as a bar, while there had been no means of suing for redemption, would have had an unjust effect in those cases, of which there might be many, where the estate mortgaged was worth much more than the debt, where it had lain unoccupied and unimproved, without any change as to interests or circumstances which could make redemption unjust or inconvenient, and where the mortgagee, in being made to re-convey the property, on receiving his debt, with all arrears of interest, could sustain no other injury than the disappointment of an unrighteous expectation.

*Shapson
v.
Smith.*

Judgment.

Suppose a strong case of this kind; that a debtor in 1792, had mortgaged a tract of land worth £1000, to

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*Simpson
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Smyth.*

secure a debt of £200; that some time after forfeiture, the mortgagee had got possession, but had made no substantial improvements, and had always afterwards refused to accept the debt and re-convey. By the time the Court of Chancery was established, the estate would have risen greatly in value, so that the disproportion between the debt and the security would be even greater than at first. Most men would admit, that if the mortgagor made use of the remedy as soon as the means were offered him, by the erection of a proper court, he ought not in such a case to find himself barred by mere lapse of time. The first question to be considered by the legislature was, whether an equity of redemption should be acknowledged, as having existed at all, while there was no equity administered in the country. When it was determined that it should be acknowledged, then the hardship would seem striking, of allowing time alone to be a bar under such circumstances; and I cannot say that in my view of the question, I should have thought it just if the legislature had refused redemption as a matter of course, in all cases where the mortgagor had not offered to redeem within twenty years, without regard to the value and circumstances of the property, and the ability of the party. I knew a case in my practice at the bar, where a person in 1795 or 6, had mortgaged a lot of land in Toronto for £10 lent him, which at that time, I dare say, was the full value of the estate. The mortgagor removed to another part of the province; the mortgagee died and his family removed to England. The lot continued unoccupied and unnoticed, till, in 1820, or about that time, some one aware of its value, and, I believe, ignorant of the mortgage, traced out the owner of the lot, and made him an offer for it. Information was then gained of the incumbrance; and before the proposed purchaser would close the bargain, the heir of the mortgagee was written to, and acquainted fully with the circumstances. His answer was the liberal one, that he conceived he had no further claim than to receive the debt and interest, and would

Judgment.

1540. not stand in the way of the sale. The purchase from the mortgagor was concluded, and not long after the purchaser sold the land, as I understood, for about £2,000. All this took place before any court of equity had been established: but if the matter had continued open till afterwards, with no alteration in the property except the increased value from the growth of the town, it would have seemed hard that such an estate should have passed into the hands of the mortgagee for a debt of £10; and yet, perhaps, when the lot was mortgaged, the mortgagee would have been unwilling to take it as a payment. Circumstances of various kinds, arising out of the conduct of the parties, and the manner in which the property had been dealt with, might in such case be thought to incline the scale against the mortgagor's right to redeem. As it was, there was the single question, whether the one or the other should have the advantage of rise in value, not occasioned by the acts of either? and equity gives that advantage to the mortgagor as the owner of the estate.

Judgment.

These are considerations on the side of the mortgagor. But the case of mortgagees also claimed attention from the legislature. I believe it was an erroneous notion prevailing before the act was passed, with many who had no concern themselves in such transactions, that the want of a court of equity was a grievance to mortgagors only, because they had no means of suing for redemption. But I always thought the grievance was greater upon the mortgagees, and was felt by them in a much greater number of instances. There might now and then be a case where the mortgagee, after the day had gone by, was inclined to refuse the money and try to keep the estate; but I imagine such instances have been rare. Where the mortgagee was not in possession, and had to bring ejectment, the 7 Geo. II., ch. 20, afforded the debtor the means of staying proceedings and relieving himself from the incumbrance by paying the debt and costs; and it was often resorted to when he had the means of paying.

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But the general course of such transactions was exceedingly unfavourable and perplexing to the creditor. Money might be lent or credit given by a merchant on the faith of a mortgage, and in the greater number of instances at an early day, it might be given upon unimproved land, upon which no rents or profits were accruing. If the creditor had taken no such security, he might have sold the estate upon an execution for his debt, and he would then have run only the risk of other creditors stepping in before him; but with this mortgage in his hands upon an unproductive property, perhaps worth no more, or even less than his debt and interest, what was he to do? Powers of sale were not often inserted, they are a new expedient even in England, or at least have not been long in general use. Take a case strongly in favour of the creditor, and suppose him in 1792 to have taken a mortgage for a debt of £500 upon wild land of no greater value; in some parts of the province, and for very many years, the rise of the land in value would not keep pace with the interest on the debt; the debtor might be reckless and indifferent, giving himself no concern about the debt or the estate, but yet declining to concur in a sale. When such a mortgage as we have supposed might have been taken, the law of England was in force here, without any provision made for equitable relief in any case; by law, the estate would become absolutely the mortgagee's when the condition was broken; and the only foundation for the idea of an equity of redemption is, that in England, where there do exist courts of equity, they have assumed power to grant the indulgence of redeeming after the day when the party at law has by default lost his estate. No such right had been in terms created here, and nothing would seem more hard or more questionable, on grounds of both law and justice, than that the parties must be held to have entered into the mortgage transaction, with a view to an imaginary equity of redemption, grounded upon an apprehension merely of a court of equity being possibly established at some future period; though in

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Smyth.

Judgment.

1846. the mean time there would be no means of enforcing the privilege, on the one side, or of guarding against it by foreclosure on the other. An argument something more than plausible might have been raised, I think, before the year 1834, against the existence of any such interest as an equity of redemption. Not but that it would be a very imperfect state of jurisprudence (as it certainly was), where parties must be left to the strict legal effect of their contracts, without means of equitable relief. Until 1837, however, parties were so left in this country, and may have found inconvenience from it in many other instances as well as in the case of mortgages, though from the nature of things they can now have no effectual relief. That there was in fact no court of equity before 1837, in Upper Canada, is very notorious. It was well known that in the British West India Islands and some other ancient British possessions, there were courts of equity exercising their authority on no other foundation, than that the governor was by common law chancellor, in virtue of his custody of the great seal; but it seems to have been generally conceded, that since the Bill of Rights, 1 Wm. and Mary, the Crown cannot by the exercise of its prerogative merely, erect any jurisdiction with power to judge, otherwise than according to the course of the common law; and it has not of late years been attempted to do so. Even in this province the Governor had, as to some purposes, been considered as invested with the authority and jurisdiction of chancellor in consequence of his custody of the great seal, but never in regard to the exercise of any equitable jurisdiction. There was no court of equity accessible for any purpose till 1837; and during all that time the holder of a common mortgage had absolutely no means whatever of foreclosing; and his security must in most cases have been wholly unproductive, unless he were at liberty to deal with the estate as his own, either by selling or applying it to purposes requiring such an outlay as no prudent man would venture upon in England until after foreclosure. In many cases no doubt some

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Judgment.

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compromise was come to which cleared the way of difficulties; in others this could not be effected, and the creditor had recourse to the expedient of selling the land on an execution obtained in a suit for the mortgage money, and buying it in himself, supposing, that whether the proceeding would give him an absolute title or not, it would at least place him on better terms for dealing with his debtor, and might be deemed equivalent to a foreclosure by any future court of equity, where that effect at the time would not have been unreasonable. In other cases—and those I apprehend not a few—the mortgagee, either ignorant of any such thing as an equity of redemption, (which might be well excused under the circumstances,) or assuming that none would be held in after times to have existed in his case, has ventured, not perhaps till after great forbearance and repeated opportunities of redemption held out to his debtor, to deal with the estate as his own, and either to occupy and improve it, or sell it, rendering himself liable by covenants to others, or embarking his own means in extensive improvements. There may have been an idea in some persons' minds at that day, that if ever a Court of Chancery should be created here, it would not be allowed to rake into cases of this description, but would be confined either to those in which the estate had not become absolute before the court was created, or where possession had not been changed, or the estate not transferred by the mortgagee; or at least where twenty years, or some other limited number of years, had not elapsed.

I believe, however, that if any such principle had been adopted, some cases would have been discovered in which its operation (without power of relaxation) would have been manifestly injurious and unfair. The legislature, at any rate, seem to have thought so, and to have considered that the best way of guarding against it would be, by expressly committing to the Court of Chancery a full discretion to deal with every such case as it might

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Smyth.

think just upon a view of all the circumstances. The objection to such a course is, that it seems (at least in cases of a doubtful complexion) to leave the parties interested in a state of uncertainty, for they can only know what the court may think reasonable, at the end of an expensive litigation; but there is the same inconvenience in many cases where specific performance of agreements is sought, and in many other instances both in law and equity, where doubtful rights can only be settled by litigation.

Judgment. It would be a great advantage, no doubt, if a certain rule could be established, by which all could measure their rights without necessity for resorting to law or equity; but that is not attainable, and least of all could it be expected to be attained in respect to contracts made and acted upon under such peculiar circumstances as I have stated to have existed here. There is no unprecedented violation of the legal constitutional principle in thus extending, with suitable caution, a new relief in regard to past transactions, which will operate upon rights already acquired. Our own statute book, as well as that of England, is full of such examples. I will instance what has been done by our Naturalization Act—and both here and in the British Parliament, (a) by acts rendering valid marriages which had been illegally solemnised; thereby changing, in many cases, the course of descent after property had actually vested. But in both these instances, the legislature proceeded with what they considered due caution, according to the nature of the case.

There would be no difficulty in supposing circumstances in which, to allow redemption of an estate forfeited before the act, would be attended with such ruinous hardship that no one could think it reasonable or just. In England there have been often scruples expressed against the right to redeem having been carried as far as it has been, even when the means of foreclosing were always accessible. If in any case of this kind arising in Upper

(a) Irish Marriages by Presbyterian ministers, 2 & 8 Vic., ch. 3.

Canada, the injustice would be greatly increased by the fact that there had been no means of foreclosing. I do not see how this court could see the injustice, and at the same time stand excused to the parties for suffering it to take place in the face of such unlimited controul as is given to it by the Chancery Act, and given in words as plain as they are comprehensive. It was urged before us that the legislature meant only, in passing this 11th clause, that the court might extend the period for redeeming—not that they could contract it; in other words, that the controul over the *right* was given only for the protection of the mortgagor, and that the mortgagee could claim nothing more under the act than a more liberal course as to compensation than the practice in England would warrant. I think it is clear that we cannot uphold such a construction, and cannot relieve ourselves from the duty of exercising our best judgment upon the reasonableness of allowing redemption at all, as well as upon the conditions in case of allowing redemption. I think it is thrown upon us to say whether, upon all that is before us, *redemption should be allowed* in this case.

1848.

Stanger v. Smyth.

Judgment.

As it is really a very important general question, whether the 11th clause gives the Vice-Chancellor a discretion to refuse redemption in the cases to which it applies, or only a discretion as to the terms of redeeming, I will endeavour, after all I have said, to place my conclusion upon it in a shorter and more precise form, in the hope of making it clearer.

The legislature in 1792 gave us the law of England as our rule of decision. By that law, if a man who has mortgaged his property for a debt does not perform the condition, the estate of the other party becomes absolute; and he has this protection only at law against the consequences, that if the mortgagee, in order to gain possession, has to bring an ejectment, then a statute (a)

(a) 7 Geo. II. ch. 20.

1846. gives him the privilege of paying the debt and costs at any time during the pendency of the action, and thus preserving his estate. The right of being relieved against these legal consequences by a court of equity, in a country where no such court exists, merely because such a relief is commonly given in another country, where such a court does exist, is, as it seems to me, rather a questionable equity. From 1792 (when mortgages began to be made here under the English law) till 1834, no trace is to be found of the acknowledgment of the equity of redemption in the statute law of the province; and no means had been provided before, or were provided then, for making such an equity available on the one hand, or fencing against it on the other. Under such circumstances, it might well be doubted, and I believe was doubted by many, whether an equity of redemption could be considered as existing; and it might have been doubted by more whether, if there should be a court of equity established in the colony, it would have authority given to it to disturb the existing relation between mortgagor and mortgagee where the estate had become absolute, and the mortgagor had lost or given up possession before the court of equity was created.

Judgment.

When the legislature did create a court of equity, and gave it power to disturb the position of mortgagor and mortgagee under such circumstances, they took, I think, a bold step, but a just one, and one more wise and beneficial than if they had withheld that power. If, however, they had compelled, or even suffered, all such past transactions to be dealt with precisely according to the English rules of equity in regard to mortgages, they would have done wrong, because they would have been making no allowance for a very important consideration in each case—which does not exist in England in regard to any case—namely, that neither party, during all the time that had passed, had been enabled to avail himself of remedies which in England are constantly accessible;

and under such circumstances the motives and conduct of both parties, the construction these should receive, and the force that should be given to them, may have a very material effect in determining what it would be just to do between them.

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v.
Smyth.

If the legislature had attempted to provide for all those past cases by certain general and inflexible rules, they would have taken, I think, scarcely a less unfortunate course than if they had declined to allow such equities to be noticed at all. In any given case, the true line to be taken would generally not depend upon any single circumstance, but on a combination of circumstances. They took, then, a middle course, and, as it seems to me, the most rational, and the best under the difficulties of the case, when they enacted the 11th clause. It is contended, that by that clause they have done no more than give a wider discretion in imposing terms, but that a mortgagor must of necessity, and notwithstanding that clause, be admitted to redeem, whenever, under the same circumstances, he would have been admitted to redeem in England. This construction overlooks the peculiarity which is recited as the very inducement to the enactment, and which makes it impossible for us to say that any case can have arisen in England in regard to the right either to foreclose or redeem, where the circumstances were similar; for no English Chancellor, since equities of redemption were talked of, has ever had to decide what it might be just to do in a case of mortgage where many years had elapsed after forfeiture, without a court of equity to apply to.

I think that the legislature, if they took a reasonable view of what they were about to do under novel circumstances, and of the interests of parties, *ought to have intended* to give to the court a discretion as well over the right to redeem at all, as over the conditions to be imposed. I think they *did so intend*, and that the

1846. language which they have used in the 11th clause expresses that intention directly and plainly.

*Simpson
v.
Scyth.*

The proviso at the end of the 43d clause of our statute 4 Wm. IV., ch. 1, cannot be treated as an enactment conflicting with the 11th clause of the Chancery Act, in the extended construction which I would give to the latter; for it merely provides that the lapse of twenty years after forfeiture shall not be of itself a bar to redemption, so long as there has been no court in which a suit could have been brought. It does not say that every one who comes within twenty years *must be allowed by that court to redeem*. It is merely negative; and if it did conflict with the Chancery Act afterwards passed, of course the latter must prevail. Its only effect, however, is to keep the right to sue open. The respondents in this case, it is clear, were not barred by mere lapse of time. It was not contended that they were. Their suit, on the contrary, has been entertained and decided upon the merits, and upon the construction of the 11th clause referred to, and under the clearly correct assumption, that the discretionary power given by that clause, is to be exercised in all cases where the estate had become absolute before the act passed; and not merely in cases where the party might otherwise be barred by lapse of time.

Judgment.

I come, then, to the second question, and this calls for a judgment upon the merits, admitting that the Vice-Chancellor had the discretionary power to decree or withhold redemption under the 11th clause. I am not aware that his Honour the Vice-Chancellor is to be understood as having come to a conclusion upon that point, being inclined, as he was, to think that the statute gave him no peculiar discretionary power over the right to redeem. I think the case a very strong one against the right of redemption, and one in which the legislature, if they had such facts under their view when they were passing the 11th clause, would have desired to withhold

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it. I shall state the leading facts, without going into all the details; for, if redemption is to be refused in any case where it is not barred by time, it ought to be upon the general complexion of the transaction, and not upon a critical examination of minor points.

1846.

Simpson
v.
Smyth.

The mortgage was made by *Thomas Smyth*, the father and deviser of these respondents, in 1810, to secure a debt of £233 due to a merchant resident in Boston, Mr. *Sewall*. The property mortgaged was 400 acres of wild land, not of good quality in regard to soil, but situated upon the Rideau River, and having the advantage of a water-fall, which, at a future day, when the country should come to be settled, might be expected to be valuable, though of less value from the circumstance that there were many other mill sites in the neighbourhood. At the time it was mortgaged there were no settlements around it, or near it. The value of the land, taking the whole of the evidence into consideration, I take to have been such that Mr. *Sewall* would not willingly have accepted it instead of the money. And I do not believe that people living in the district, and having better opportunities of judging, would have thought the purchase of the land at that sum a good investment of the money. There is, to be sure, against this opinion the evidence of Mr. *Covell*, who says that he passed through or near this land in 1798; and that he was so struck with the situation, that even then, when there was no one living near it, he thought in his own mind at that time that it was worth £10,000. The whole annual revenue of the province, I should think, did not amount at that time to £10,000; and I have no doubt it is true, as was affirmed on the argument, that the whole township of Elmsley, containing more than 60,000 acres, of which these 400 acres are part, could have been bought then for much less money. The whole account given by witnesses on both sides, of what took place twenty years after the time Mr. *Covell* speaks of, when the land was offered for sale, and actu-

Judgment.

1846. ally sold, and when the country must have contained more than five times as many inhabitants, is sufficient proof that this witness' notion of value is quite visionary, if what can be got for a property is to be taken for the test of its worth. The evidence of what adjoining properties have been sold for between 1810 and the time of filing this bill, is also convincing upon that point. Mr. *Smyth*, it appears, was quite willing to take one-tenth part of what Mr. *Covell* says was its value in 1798, twenty-five years afterwards, though he had in the mean time put up a saw mill upon it; and it was because he could not get that, and would not take less, that the property was lost to him.

*Simon
Smyth.*

The mortgage money was to have been paid on the 3rd August, 1811. It was not paid then; nor is it shewn, nor I think pretended, that either Mr. *Smyth* or the present respondents, or any one on their behalf, ever paid, or offered to pay, any part of the principal or interest, from that time to the filing of this bill.

Judgment

In 1819, eight years after the debt should have been paid, judgment was entered at the suit of *Sewall*, against *Smyth* the mortgagor; I suppose for the amount then due on the mortgage, as no other debt is spoken of. If the object of entering that judgment, was to enforce the payment of the debt by compelling in any way a sale of the lands, (a proceeding which both parties might then have thought open to them,) the judgment was not acted upon in a manner that shewed any keen desire on Mr. *Sewall's* part to get hold of the property, or that precluded Mr. *Smyth* from using at his leisure whatever means were in his power for saving it from sale, (if that were thought an object,) for no execution against the lands was taken out upon it for about five years after it was entered. Mr. *Jones*, a respectable gentleman living in the neighbourhood of Mr. *Smyth*, was the agent of Mr. *Sewall*, to whom he could conveniently make any payments and propose any arrangements that he might

desire. In order, as it would seem, to enable Mr. Jones to deal more conclusively and conveniently with the security, he took an assignment from Mr. Sewall, of the mortgage, for a nominal consideration. Judging from the face of the instrument, and from the communications spoken of in the evidence as having afterwards taken place between Mr. Smyth and Mr. Sewall, I imagine that in taking the assignment, and in whatever was done by him subsequently, Mr. Jones merely acted on behalf of Mr. Sewall, who still in fact retained the security, and the entire control over it. By our law, there must be the delay of a year before land can be sold under a *fi. fa.* Mr. Smyth had that time, therefore, at least given him to procure the money after his creditor had shewn his determination to enforce payment. It was as long a time as in the common course would have been allowed for foreclosure, if Sewall had had a court of equity to resort to; and it is clear that Smyth had full knowledge of the intended proceeding. The land was brought to a public sale in August, 1825, under Sewall's writ, and was then sold as Smyth's, or rather, all his right in it was sold, so far as the sheriff could sell it. He had no other interest in fact than his supposed equity of redemption. Whether Mr. Sewall, or his agent, Mr. Jones and Mr. Smyth, thought it could be thus effectually extinguished by the mortgagee purchasing it at a public sale, we cannot tell; both parties acted at the time as if they thought so. The result was, that Mr. Jones, bid it off at £105. The sheriff's deed makes no mention of the precise interest, nor of the incumbrance, but is in the usual form of sheriff's deeds upon such sales.

1846.

Simpson
v.
Smyth.

Judgment.

If we can suppose a stranger coming to the sale and bidding off the land, without any explanation or knowledge of the facts, and being merely content to buy Smyth's interest, whatever it might be, then if the sale under a *fi. fa.* of an equity of redemption, could bind such an interest, the effect would have been, that he

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v.
Smyth.

would have had the land with the incumbrance upon it; *Sewall*, nevertheless, would not have been restrained from pursuing his remedy against any other property of *Smyth's* for his debt. And if it had been afterwards thus paid, or paid voluntarily by *Smyth*, then the purchaser would have held the land discharged from the incumbrance so far as *Sewall* was concerned, but would be liable in equity, if not at law, to make good the sum to the person who paid it. On that point I refer to *Crafts v. Tritton*. (a) But here Mr. *Sewall's* agent was the buyer; he knew the particulars of the incumbrance; and if, on *Sewall's* account, he bid £105 above that incumbrance, as the value of *Smyth's* interest, then the debt would be paid, because it formed part of his bid. If Mr. *Jones* had bought on his own account, he must, I should think, be necessarily regarded as bidding £105 in addition to the debt and interest; and the sheriff should have seen that there was no misunderstanding on that point, but that the debt was paid (as being part of the price) before he closed the transaction by making a deed. How it was arranged, and what was in fact done, no where appears. Mr. *Smyth* is not shewn to have been in any way afterwards molested on account of the debt; and it is not pretended that he paid any part of it, at any time, in any other manner.

Judgment.

Some years before this sale, it seems, he had put up a small saw-mill on the lot, but made no improvement otherwise, unless the clearing one-eighth of an acre of the land can be called such. What beneficial use was made by him, or any one, of this saw mill, is not stated in such a manner as can give any idea of its value. It seems to have been but little thought of, for it was suffered to fall into decay; and just before the sheriff's sale, *Smyth*, as if abandoning all idea of retaining the property, sent his sons to take out the saw-mill irons, which was done by carelessly cutting them out from the wood-work, as might have been done by any one who

(a) 8 Taunton, 365.

felt that he had no longer any interest in the mill, or that it was useless. Whatever may have been imagined by *Smyth* to have been the legal consequence of the public sale of his interest, he does not seem to have been surprised by it, or to have complained of it. On the contrary, he went out of possession, as if that should follow of course; and then considered what he could do for still getting back the property during the period which it is admitted Mr. *Jones* still allowed him, and kindly allowed him, as he acknowledged, if he could, through his relations or friends, make any arrangement for that purpose.

1846.

Simpson
v.
Smyth.

If being in a condition to redeem, or resolving to stand on any right of that kind, he had thought it necessary to contend for more than Mr. *Sewall* was willing to allow him, in the shape of indulgence, it was open to him to have retained the possession, notwithstanding the sale. Then the purchaser would have been driven to his ejectment, and any time while that was pending, and up to judgment, *Smyth* would have had the privilege, under the statute 7 Geo. II., ch 20, which was well known and often acted upon here, of staying the proceedings, and procuring a re-conveyance, on payment of the debt and costs. Instead of this, however, he communicated amicably with Mr. *Sewall*, and found both him and Mr. *Jones* willing to act considerately, and to give him every chance of retaining or regaining the land, if he could do it, and thought it worth his while. What efforts he did make, we see ended in nothing. He could find no one who cared sufficiently about purchasing it, to take the trouble of perfecting an arrangement for that purpose, upon the easy terms of giving him any sum, from £25 to £100, beyond the debt and interest, which he was willing to take, payable at any time and in any manner. The reasons given for the failure are absurd, if we can suppose that the property was considered by any one to be a great bargain on such terms. One had lent his

Judgment.

1846. money, and did not like to ask for it back, thinking perhaps that it was better out at interest than applied to this purchase; another seemed at one time half willing, and then retracted; and some of these parties were connexions of Mr. *Smyth*, having every motive and wish to serve him, as we may suppose, if they thought the matter of much consequence. What must we conclude would have been the situation of these parties, at this point of time, if there had been a court of equity in the province, affording ready means of foreclosure?

Though the sale on the execution is now held, and perhaps by lawyers was then known, to be an useless proceeding, it had at least the effect of shewing Mr. *Smyth* that his creditor was determined to have the money by sale of the land; it was at least a manifestation of his desire to close the transaction, and a call upon Mr. *Smyth*, after many years of indulgence, to act effectually; and Mr. *Smith* submitted to its supposed consequences by yielding up the possession.

About this time a new aspect of things began to open. The British Government, in 1826 or 1827, were known to have resolved upon making the Rideau Canal, which now unites Lake Ontario with the River Ottawa, passing through the district in which these 400 acres lie, and along the waters which run through the whole township of Elmsley. It was a magnificent undertaking, and its construction occasioned an expenditure of more than a million of money. Though it could not be known how it would affect particular properties, situated along the waters, till the precise line was determined, the prospect of such a work of course excited attention and enquiry respecting property in the vicinity, and made it more saleable. Mr. *Jones*, who then held the conveyance from the sheriff, besides the transfer of Mr. *Sewall's* mortgage, had an offer made to him. It is clear on the evidence that he had no desire either for

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Sewall or himself to be the gainer by the change of 1840.
 circumstances, which did not yet seem indeed to have
 operated very decidedly on the value of the land, for
 the offer was only £800, which would but little more
 than cover the debt and interest, to say nothing of the
 £105 bid on account of *Smyth's* supposed interest.
 Before Mr. *Jones* would accept it, he referred to Mr.
Smyth; indeed the proposed purchaser was a friend
 and neighbour, and would have had nothing, as he
 declared, to do with the land, if *Smyth*, even at that
 time, could redeem it. Nothing effectual was done by
Smith, and the sale by Mr. *Jones* to *Hiscock* and *James*
Simpson was concluded in July 1827, for £600.

Simpson
v.
Smyth.

Soon after, great public works were in progress at
 this section of the proposed canal. *James Simpson* was
 a contractor; and being an active, zealous man, with
 capital at command, he opened roads from this point
 into the interior, which made this a central position:
 the public expenditure assisted the formation of a
 village; there were some appearances that it would grow
 rapidly, and others were induced to embark money in
 purchasing portions of the property, till, after several
 transfers, it came, in 1832, into the hands of the
 appellants *William Simpson* and *Ward*, for a price paid
 by them of £5,000. Then they separated their interest,
 and both have been since selling village lots, and
 applying themselves in various ways to promote their
 own interests there, and the advancement of the village
 for their own sakes. *Smyth* lived till the close of
 1831; his sons, the respondents, were, before that,
 grown up men, living in that country, and acting for
 and representing their father. The Court of Chancery
 was established in 1837. This bill was filed in November,
 1840. In the meantime, the evidence shews that a
 village had grown up on these 400 acres. Churches
 have been built there; houses, shops, mills and manu-
 factories, of various kinds; and complicated interests,
 as we must suppose, have sprung up. Looking, on the

Judgment.

1846. one side, at whatever Mr. *Smyth* or these respondents have done to keep their supposed interest alive, and, on the other, at what has been done by them by which it is stated to have been compromised, I do not think that this is a case in which a concern of such magnitude should be unsettled by allowing redemption.

Simpson
v.
Smyth.

It is true, there is no absolute bar by lapse of time; for, under the facts of such a case, in England, time would have begun to run only when *Smyth* went out of possession, in 1825, I believe—fifteen or sixteen years before the bill was filed. It is true, too, that the deeds by which this property has been transferred from one to another, till it came to *Simpson*, do not on the face of them profess to convey an unqualified interest; and it is argued that that shews their knowledge of the mortgage. That they knew of it, there is no doubt, and of what had taken place after it. So far as that is material, there is no doubt about it. They probably knew all, or most of what we now know; but I should lay little stress on the form of these deeds—they all follow the form of that which the sheriff had given to Mr. *Jones*. Each would naturally convey the estate in no more absolute form than he received it; and the form of the sheriff's deed was not peculiar—it was such as is usually given upon all sales of land in execution. The sheriff only pretends to assign whatever interest the debtor may have. His deed was probably looked to here as the foundation of the title; and it was natural the subsequent deeds should conform to it. It was incumbent on each successive purchaser to consider, and enquire, and judge for himself. If they concluded—as I suppose they did when they were paying such large sums—that they might rely on *Smyth* not being allowed to disturb them by any court of equity, which might possibly be established after all that had occurred, I think they judged reasonably. And if they should be disturbed now, and there should be injustice in allowing it at this late day and under the particular circumstances before

Judgment.

us, then I think, looking at the provision which the legislature has made in the 11th clause of the Chancery Act, we should be responsible for that injustice.

1846.

Simpson
v.
Smyth.

The decree does not contemplate saving *W. Simpson* and *Ward* from the loss of their purchase money; and it could not save them from other losses, of which no account could be taken. They must be supposed to have disposed of what they have sold, and to have done what they have done, in a great measure with a view to improve the value of the remainder of the land, which this decree would take from them. I do not see how any decree could be framed that would place them in a just position, unless it can be held that they deserve to bear the losses I have stated, which, under the circumstances, I do not think they do. The decree, in other parts, is admitted to be such as cannot be supported and carried into effect; and I think it manifestly could not, in several points. It has been urged that we could model it as we pleased, under the extensive powers of the statute; that we could give compensation so full and particular as to embrace every thing, though it is admitted that that might leave hardly a surplus of interest worthy of redeeming, or at least might make redemption impracticable. This would be acting somewhat on the same principle that the importation of certain goods is often prevented, by laying on duties that amount to a prohibition: but I think it would be a much more proper and respectable course to give the protection directly and effectually, by not allowing the position of the parties to be changed, where such injury and inconvenience must follow.

Judgment.

I do not consider that what *James Simpson* may have done in making roads, or any thing of that kind, is connected with the case; for that was done by him as a contractor, for facilitating his work on the canal in getting supplies, &c., and it was before he had an interest in this property. Neither do I think that the

1846. making the canal, so far as that has enhanced the value of the land, is an improvement in value, by any thing that the mortgagee, under ordinary circumstances, could claim credit for. The mere water power does not seem to have been rendered better by the canal, but rather otherwise.

Simpson
v.
Smyth.

On the whole, I think, when there has been so much liberal indulgence on the one side, and so much indifference and want of exertion on the other—no direct offer to redeem till the bill filed—all the effort made to foreclose that was in the power of the other party—an apparent submission to the effect of that effort, by giving up possession—new and great interests sprang up under the view of these respondents and their ancestor, without remonstrance or attempt to check it—that we ought not now to let these respondents in to redeem, because they represent an interest which their devisor, while he held it, was willing to part with for £20 or £30, and could get no one to give him that for it.

Judgment.

' I do not ascribe a decisive effect to the sale under execution alone; if that was all that could be shewn, it should depend on other circumstances whether it should have any weight or none. Nor do I consider the great rise of value, under the facts proved, to be an advantage of which the mortgagee is entitled, as of course, to reap the benefit. I look at all the circumstances, the claim to redeem, the difficulty of redeeming, the conduct of the parties, the rights and interests and convenience of others, perhaps, even in some sense, the public convenience, the hopes that opening the title under such circumstances might give to others, who now more justly allow matters to repose as they are, I would not attempt to lay down any inflexible principles for acting on the discretionary power given by the act. It would be particularly unwise to do so. Each case must be looked at with all its attendant circumstances;

no one of which, if it stood alone, might be a reasonable ground for withholding redemption, though all, together, may afford reasons irresistible. The exercise of a large discretionary authority of this kind is the most irksome department of judicial duty. No court could desire to be intrusted with it; but I think the legislature would have acted inconsiderately if they had not, under the peculiar circumstances, committed it to some quarter; and I do not know where it could have been more properly vested than in the Court of Chancery, with the power of appealing to the judicial committee of the Privy Council.

1846.

Simpson
v.
Smyth.

When I said that I think we should be careful not to attempt to limit the exercise of the discretionary power given by the 11th clause by any inflexible rules, I had it nevertheless in my mind, that there is one principle which it would seem reasonable to lay down as a general rule, to be observed in acting upon that clause, namely, that one of the two parties to a mortgage should not be suffered to gain a positive advantage to himself greatly at the expense of the other, merely from the absence of an equitable jurisdiction; which advantage it may appear clearly he would not have had if there had been such a jurisdiction established. Now here, on the side of the mortgagee, it seems evident that, if there had been a court of equity open from 1811 to 1827, he or his assignee never would have allowed Mr. *Smyth* to keep his equity of redemption open. They gave, by their conduct, every evidence that they would not; they did as much as they could towards foreclosing; and after what was in fact done, it would be unreasonable to suppose that, if Mr. *Jones* or *Hicock*, or *Simpson* and *Ward*, had had the opportunity of going to a court of equity for that purpose, they would have acted as they did, without foreclosing; they would surely not have left it in Mr. *Smyth's* power to file in effect a bill to redeem against a whole village, subjecting themselves to ruinous losses and to disappointments that might be irreparable.

Judgment.

1846.

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v.
Smyth.

On the other hand, what is there in the evidence to shew that, if there had been a court of equity open in this province from 1811 to this moment, the opportunities of Mr. *Smyth* to preserve his estate would have been better than they were under the circumstances that existed? It is clear that, for nearly sixteen years after default in paying the debt, redemption would have been gladly allowed at any time by the voluntary act of the mortgagee, and without the aid of any court; and though soon after that time the circumstances of the property came to be very materially changed, yet neither Mr. *Smyth*, nor the respondents after his death, ever put it to the proof whether they could have obtained without a court of equity, whatever such a court could have given them. They never went forward and offered to pay their debt, and have not shewn that they were ever able to do so; and when they saw these defendants and their vendees expending their labour and money, and wearing out their lives and means in using the property as their own, they never took the decided step of checking them in the course they were pursuing, by declaring a determination to apply for redemption, till in November, 1840, they filed their bill, thirty years after the land had been mortgaged, and, as I think, for its value.

Judgment.

These being the facts, my opinion is, that the decree for redemption should be reversed, and the bill dismissed.

MACAULAY, HON. J. B., EX. C.—It is my misfortune to differ from the learned Chief Justice on one point; and whenever I am so unfortunate, I differ with great regret, humility, and distrust of my own judgment. My excuse is, that while I sit here it is my duty to form an opinion; and that, whatever that opinion may be, the parties are entitled to the benefit of it, and that it is incumbent on me to give them that benefit.

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opinion on that point is formed—I feel and confess the whole responsibility of such an opinion to be my own; for, if learning, ability, research and able argument, could have guided my mind to a different conclusion, they have had the full benefit thereof.

1846.

Simpson
v.
Smyth.

The first point is the effect of the sale by the sheriff of Johnstown, upon the equity of redemption. The ordinary style of writs of *fiery facias* against lands, commands the sheriff to levy the amount "of the lands and tenements" of the debtor; and it does not appear that the language of the one referred to in this case was otherwise worded. It was admitted in the argument, that the terms of the 5th Geo. II., ch. 7, namely, houses, lands, and other hereditaments and real "estate," were comprehensive enough to embrace equitable interests; and that the word "*lands*" may include an equity of redemption. Assuming this to be so, the writ authorised in effect the sale of such an interest, if it could be disposed of under such an execution by a court of law. The sheriff's deed does not restrict the sale to the equity of redemption; it makes no allusion to any mortgage or incumbrance; it recites the seizure of the two lots of land in question, and then conveys all the right, title, interest, property, claim and demand of the debtor (*Thomas Smyth*) therein. The deed is, therefore, also, comprehensive enough to include the equity of redemption, if saleable. Whether it formed the express subject of sale, or whether Mr. *Charles Jones* bid £105 as for the whole premises, or merely for the equity of redemption; and whether the sum of £105 was ever paid by him to the sheriff or to *Smyth*, as a surplus above the mortgage debt; or whether it was retained by him, and applied in reduction only of the mortgage, leaving the balance still due by *Smyth*, does not appear. The sheriff's deed acknowledges the payment, as for all *Smyth's* interest, and no more is said on the subject. As to the real fact, there is no proof that the £105, or any part of it, was paid, or treated otherwise than as a credit of so much in *Smith's*

Judgment.

1846. *Smyth* v. *Smyth*. favour, upon the judgment or mortgage debt. The object of the sale no doubt was, to take from *Smyth* all remaining interest, and to transfer it to the purchaser; and could it have such effect, the equitable interest uniting with the legal estate already in *Mr. Jones*, the estate would have become absolute in him.

The effect of this sheriff's sale is a question that properly arises in a court of equity; there being no legal estate to sell, if any thing passed it must have been an equitable interest; for I do not think that, by any construction, the legal estate can be held to be embraced by reason of an implied assent of the mortgagee, that the whole estate, legal and equitable, should be sold. The sheriff could not shift the legal estate; that could only be done by the mortgagee himself, or his assignee.

Judgment. Many arguments were urged for and against the efficiency of the sheriff's sale to pass the equity of redemption; and doubtless such an effect has been allowed to writs of *fi. fa.* in other countries, where the statute 5 Geo. II., ch. 7, was in operation. But the cases cited seem to have determined against it. In *Burdon v. Kennedy*, (a) the Lord Chancellor says, "In the present case there is only an equity of redemption in the debtor in the leasehold estate; and an *execution lodged* will not affect this, as the legal estate is in the mortgagee." (b)

I cannot satisfactorily distinguish between those cases applied to equities of redemption in leasehold estates, and the present. They apply in principle. One reason why an execution at law cannot attach upon such an interest is, that it constitutes equitable assets. If liable to be disposed of under a *fi. fa.* during the lifetime of the mortgagor, it would be assets after his death, and as such be disposable in like manner. But, being equitable assets, it is only properly administered

(a) 3 Atk. 789.

(b) *Lyster v. Dolland*, 8 Bro. C. C. 478; *Scott v. Scholey*, 8 East. 466; *Metcalf v. Scholey*, 2 N. B. 461; *Doe Webster v. Fitzgerald*, Q. B. U. C.

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in a court of equity, and distributable as equitable assets upon a different principle than that which applies to legal assets. Furthermore, upon a plea of *plene administravit* and issue, the executor or administrator is entitled to a verdict, upon proof of the due administration of the legal assets; and it would be no answer that there were equitable assets; for, as to them, the creditor might not be entitled to the same priority. I consider the sheriff's sale, therefore, inoperative; and, if so, nothing passed; and it being void, the equity of redemption remained where it was before. If the sale had no effect upon such equity, no equitable right could accrue to the purchaser under it. It remains, therefore, only as a circumstance in the case which influenced the acts and conduct of the parties, under a mistaken supposition that it had, or might be afterwards decided to have had, an effect on the estate, which, it now turns out, it had not. It is, therefore, as respects any equitable considerations, merely a circumstance influencing both parties—the mortgagor and the assignee of the mortgage—under a misapprehension of its real effects upon their respective rights.

Judgment.

As regards the demurrer for want of parties, I concur fully in what has fallen from his Lordship the Chief Justice.

It is next to be considered, whether by law the respondents are estopped from redeeming, owing to lapse of time, acquiescence or otherwise, 'apart from the 7th Will. IV., ch. 2, sec. 11; and if not, then, whether that clause vests in the court a wider discretion, under which they may be precluded.

The 11th section of the Chancery Act is to be construed in the abstract, and the powers it confers determined, without regard to any particular case; and I shall first consider it. The argument of inconvenience was strongly urged in favour of a strict construction, in extension of

1846. its provisions, against as well as in favour of relief; but, admitting the force of such arguments, it is to be remembered we are to expound, not make, a law; and that, whatever discretion is vested in us by law, is a judicial discretion, to be interpreted and exercised according to established rules and principles of construction, and in subservience to the rights and interests of the litigant parties for whom a right, legal or equitable, is *prima facie* established—the onus of subverting it is upon the opposite side, and the power to overturn it is to be cautiously exercised.

Judgment.

An equity of redemption is in equity regarded as the estate itself, and the mortgage thereof a pledge only; and the law of England in relation to mortgages is, in connexion with our statute law on the same subject, to be borne in mind, and, when referred to, both will be found to display a solicitude (I might almost say unreasonable) in favour of mortgagors. I am myself friendly to the statutes of repose; as a legislator, I would, if any thing, have made them more stringent than they are in favour of quieting possessions; and, among other things, I would, in passing the Chancery Act, have had no scruples in giving effect to all sheriff's sales under circumstances like the present—subject to exception in peculiar cases, in the discretion of the court—making the want of effect in such sales the exception, instead of leaving it universal, as it now is; and I so intimated, I think, in my answers to a series of questions put to me by a committee of the Legislative Council, when the Chancery Act was under consideration.

The value of real estate in Upper Canada in by-gone years, compared with its value in more recent periods, and a knowledge of the large extent to which it has been made an article of commerce, as it were, and the loose and careless way in which in times past sales have been completed, and imperfect titles ignorantly accepted, and other considerations, press strongly in favour of liberal legislative provisions to confirm titles taken *bona*

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side for value, and supposed to be valid. It is, however, the province of the legislature, and not of the courts of justice, whose rules of decision are prescribed. 1846.

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Smyth.

In endeavouring to interpret the 11th section of 7 Will. IV., ch. 2, I have tried to analyse it, by separating that which relates to mortgagors from what relates to mortgagees. This I think a correct course, and well calculated to present a clear view of the several portions applicable to each respectively. Had the provisions of this clause been divided by the legislature into two distinct sections, they would be construed together; and I do not perceive that they would have less force, so separated, in relation to each other, than they have, blended as they are in one clause, I would refer to the state of the law at the time it was adopted, and to the rules by which statutes are to be construed; some of which, not inapplicable, are mentioned by me in the case of *Gardner v. Gardner*, cited in the argument.

Judgment

In addition to the law of England, the statute law of this province, on the 4th of March, 1837, was to the following effect:

By 31 Geo. III., ch. 31, sec. 48, "All lands granted in Upper Canada shall be granted in free and common soccage, in like manner as lands are holden in England in free and common soccage."

32 Geo. III., ch. 1, sec. 3, directs that "In all matters of controversy relative to property and civil rights, resort shall be had to the law of England, as the rule for the decision of the same;" and, by

7 Will. IV., ch. 2, sec. 2, the Court of Chancery is given jurisdiction in all matters relating to mortgages.

Sec. 6.—"The rules of decision shall be the same as govern the Court of Chancery in England."

1846. Statute 4 Will. IV., ch. 1, sec. 16, enacts that "No
 Simpson person shall make entry or bring an action for lands,
 v. but within twenty years next after the time at which the
 Smyth. right to make such entry, or to bring such action, first
 accrued."

Sec. 17, mainly upon conditions broken.

Sec. 19.—"In cases of tenants at will, the right shall be deemed to have accrued at the determination of such tenancy, or at the end of one year after the commencement of such tenancy; *provided*, no mortgagor shall be deemed to be a tenant at will, within this clause, to his mortgagee."

Sec. 32.—"No person claiming any land in equity shall bring any suit to recover the same, but within the period during which, by the provisions of this act, he might have made entry or brought an action to recover the same, if he had been entitled at law to such estate, interest or right, in or to the same, as he shall claim therein in equity."

Sec. 35.—"Nothing in this act to interfere with any rule or jurisdiction of courts of equity, in refusing relief, on the ground of *acquiescence or otherwise*, to any person whose right to bring a suit may not be barred by virtue of this act."

Sec. 36.—"When a mortgagee shall have obtained possession of the land, the mortgagor shall not bring a suit to redeem, but within twenty years next after the time at which the mortgagor obtained such possession, unless in the meantime the right be acknowledged in writing."

Sec. 43.—"No action, or *other proceeding*, shall be brought to recover any sum of money secured by any mortgage, judgment, lien or otherwise, charged upon,

or payable out of, any land, at law or in equity, but within twenty years next after the present right to recover the same shall have accrued," &c., unless part paid or acknowledged. &c. "Provided, that in respect to persons now entitled to an equity of redemption, the right to bring such action, or to pursue a remedy for the same, shall not be deemed to be extinguished or barred by lapse of time, until the expiration of five years from the time that an equitable jurisdiction shall be established—provided that shall happen within ten years."

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4 Will. IV., ch. 16, makes a certificate of redemption equivalent to a re-conveyance; "provided that such certificate, if given after the expiration of the period within which the mortgagor had a right in equity to redeem, shall not have the effect of defeating any title, other than a title remaining vested in the mortgagee, his heirs, executors or administrators."

Judgment.

Such being the state of the law, the eleventh section of 7 Will. IV., ch. 2, recites that the law of England was at an early period introduced into this province, and had continued to be the rule of decision; and at the same time, for want of an equitable jurisdiction:

it has not been in the power of mortgagees to foreclose.	mortgagors, being out of possession, have been unable to avail themselves of their equity of redemption.
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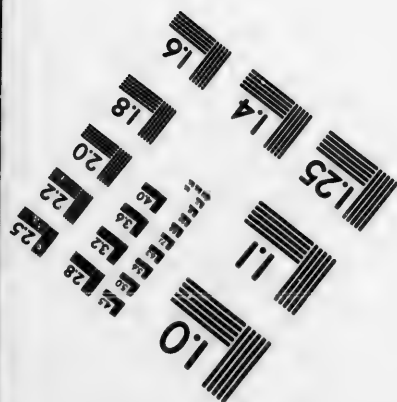
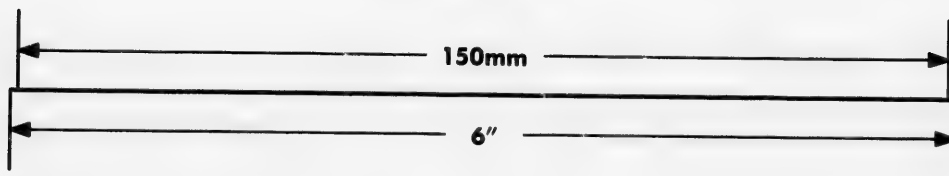
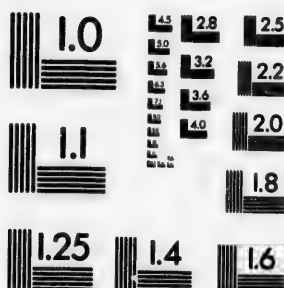
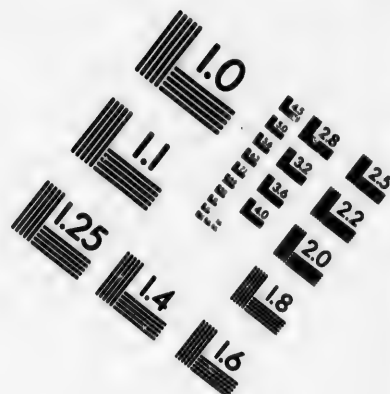
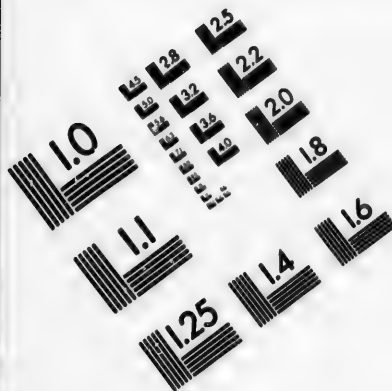
And, in consequence of the want of these remedies (or this remedy)

their rights may be found to be attended with peculiar equitable considerations, in regard to compensation for improvements,	their rights may be found to be attended with peculiar equitable considerations, in respect to the right to redeem,
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depending upon the circumstances of each case; and a

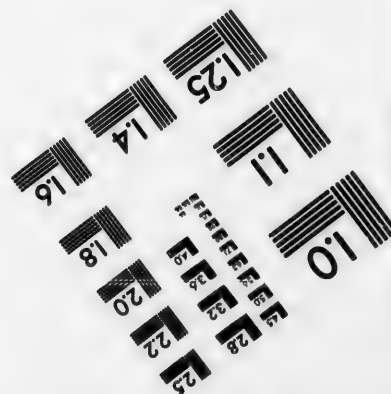


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1846. *strict application of the rules established in England might be attended with injustice; "Be it therefore enacted, that the Vice-Chancellor of the said court shall have power and authority, in all cases of mortgages become absolute at law, before the (4th day of March, 1837,) by failure of performance of the condition, to make such order and decree,*

*Simpson
v.
Smyth.*

in respect to foreclosure, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor,

in respect to redemption, and generally with respect to the rights and claims of the mortgagor,

as may appear just and reasonable, under all the circumstances of the case."

Judgment The first part of the recital states merely two facts, but the mode of expression is peculiar, and indicates the inducement to the enactment which follows: it states that it had not been in the power of mortgagees to foreclose, and that mortgagors out of possession had not been able to avail themselves of their equity of redemption; and as a consequence of the want of these remedies, that *their rights* (that is, to foreclose or redeem) might be attended with peculiar equitable considerations, in respect to compensation for improvements, and in respect to the right to redeem. So far as the recital is a key to the interpretation of a statute, the present shews very plainly in what respects it was apprehended peculiar equitable considerations might arise, namely, in relation to mortgagees claiming for improvements, on the one hand, and mortgagors seeking redemption, on the other. It then adds, that a strict application of the rules established in England might be attended with injustice. This implies that the injustice was to be apprehended from the strict application of the law of England; but the time, so far as the mere lapse of time is concerned, within which foreclosure

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or redemption could be obtained, was and is regulated by the provincial statute 4 Wm. IV., ch. 1, and not by the rules established in England; and I do not see that this eleventh section overrides that act, so as to empower the court to dispense with or alter its provisions; in other words, to refuse foreclosure or redemption within twenty years after the time shall have commenced running, merely by reason of the lapse of time; whether therefore a mortgagor or mortgagee pursues his remedy in due time, is to be decided by a reference to the above-mentioned statute (a). The 35th section of that statute, however, enacts, that it shall not interfere with any rule or jurisdiction of courts of equity, in refusing relief on the ground of acquiescence or otherwise. Taking then the rule of acquiescence, it would seem clear that, in relation thereto, the rule in England may be relaxed, so as to admit a mortgagor to redeem, although strictly precluded on that ground. The question of difficulty is, whether, if entitled to redeem, notwithstanding the strict application of the rules of England, a *stricter* rule can be applied to prevent it? and, generally, whether either party, being entitled to foreclose or redeem by the strict application of the rules established in England, such right can be curtailed by the application of a stricter rule. The argument is, that relaxation in favour of one party, must have a contrary effect as against the other, and that in relation to acquiescence, facts and circumstances falling short of it by the rule in England, may be held to amount to it here, to prevent a redemption within the twenty years allowed by the statute of 4 Wm. IV., ch. 1, and in like manner in relation to any other rule in England, that it may be extended in favour of, or restricted against either party, as may appear just and reasonable.

1848.

Stanger
Payth.

Judgment.

The ulterior view is, that this clause intended that the

(a) In the event of the time having expired, a question might arise whether, under the equity of sec. 11, it could be opened and relief granted, although the statute 4 Wm. IV., ch. 1, would otherwise have operated as a bar.

1846. court should not be restricted to the rules in England at all, but that occasional exceptions might be made, or a new rule *pro hac vice* be adopted in granting or refusing relief, under circumstances in which, by the rules established in England, applied strictly or even liberally, it would not be warranted; in short, that each case may be disposed of according to its own merits, as may appear just and reasonable, without regard to the nature of the relief sought, or to the rules established in England.

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v.
Smyth.

Judgment.

To a certain extent I can perceive a discretion vested in the courts here, to expand or modify the rules which govern the courts in England, in favour of the rights and claims of mortgagor and mortgagee, but the limits to that discretion are not clear. It is contended, it may extend to *abridge* the rights of either party, as well as to extend them, by granting or refusing relief on broader or narrower grounds than in England: whether it be so, depends upon the spirit and meaning of the section in question. Being a remedial clause, it is to be construed liberally; but in what respect is it remedial? It is so in regard to either party that may require its aid. It may favour the mortgagee in respect to foreclosure, compensation for improvements, and generally with respect to his rights and claims. It may favour the mortgagor in respect to redemption, and generally with respect to his rights and claims; and where one is favoured it must necessarily be at the expense of the other. The extent and nature of such favour is the point of doubt. It is no favour to apply a stricter rule against the party seeking relief, than would be authorised in England: it converts a remedial into an irremedial act: it is not a benign, but a rigid and forced application of it. It is extending a favour to the opposite party, subversive of the right to the relief sought, and incompatible with an equal respect to the rights of both. A mortgagee seeking foreclosure, or any other relief, may not be entitled to what he asks, according to the strict rule: in such an event the rule may be relaxed in his favour. A mort-

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gagor, seeking redemption, may require a similar indulgence. Here each party in turn may experience an ameliorative application of the rules in England. It is the reverse of this to refuse the relief by a more stringent application of the rules of equity; not to unbend them in favour of the party requiring relief; but to tighten them against him to his prejudice: to say to a mortgagee, you are clearly entitled to foreclosure by the English rules, but it would be unjust towards the mortgagor to allow it upon any terms, and it is refused; or to say to a mortgagor, you are clearly entitled to redeem by those rules, but it would be unjust towards the mortgagee to allow it on any terms, and it is refused—is to apply a stricter, not a more benign rule than prevails in England. Is it making a just and reasonable decree in respect to *foreclosure*, or generally with respect to the rights and claims of the mortgagee, to refuse foreclosure on any terms, where he is, by the rules of England, clearly entitled to it?

1846.

Simpson
v.
Smyth.

Judgment.

Is it making a just and reasonable decree, in respect to redemption, or generally in respect to the rights and claims of the *mortgagor*, to refuse redemption on any terms, when, by the rules in England, he is clearly entitled to it? How can a rule be just and reasonable here, which is more rigid than the rule established in England, the strict application of which, it was apprehended, might be attended with injustice?

The appellants contend for a shifting application of this clause so as to grant or refuse foreclosure, not according to the rights and claims of the mortgagee when seeking relief, but of the mortgagor, and *vice versa*. Now foreclosure, when the mortgagee is entitled to it by the rules in England, must be consistent with the *rights* of the *mortgagor*. So, *e contra*, redemption, when the mortgagor is entitled to it by the same rules, must be consistent with the *rights* of the *mortgagee*; so that the mortgagor can have no *right* to a decree against fore-

1846. closure to which the mortgagee is entitled; nor can the mortgagee have any *right* to a decree against redemption, when the mortgagor is entitled to it. If this be a correct view, then it depends upon the *claims* of the parties; and surely a mortgagor could not *claim* to have foreclosure refused, or the mortgagee claim a refusal of redemption, if clearly the *right* of the party seeking the relief. Consistently with these rights there may well exist *claims* on the other side for favourable consideration, to be granted in subservience to such right; but to allow a claim falling short of a bar to the right, to operate as a bar to it, looks like usurping a discretion, and frustrating the remedial objects of the legislature, which did not mean to take away existing rights, but only to subject them to conditions or terms inadmissible by the strict rules established in England.

Judgment. The clause [section 11] empowers the court to make such order or decree, in respect to foreclosure, as may appear just and reasonable, having regard to the *rights* and *claims* of the mortgagor. Is it just and reasonable to refuse it when the right of the mortgagee is clear, whatever may be the *claims*, falling short of a bar, to that right, but subordinate to it, of the mortgagor? So, as respects the mortgagor, is it just and reasonable to refuse redemption, when the right thereto is clear, whatever may be the *claims*, short of a bar to that right, but subordinate to it, of the mortgagee? If, by the rules established in England, the mortgagee is entitled to foreclosure, or the mortgagor to *redeem*, what *rights* or *claims* can exist on the other side, that shall extinguish such right? When two opposing rights are advanced, one must predominate; and when it is decided which, the antagonist claim ceases to be a right, though it may remain an equitable claim.

The right to foreclose or redeem by the law of England, cannot be repelled or destroyed, however modified, unless a countervailing *right* of paramount weight be

established; but the argument is, that such right may be destroyed by that which falls short of a paramount right by the same rule. Of course, a mortgagee or mortgagor seeking relief, must establish a *right* to foreclose or redeem, in the first instance, by the rules of England; if they *fail* him, he may obtain assistance from the clause in question, when proper to grant it; but if he does not *require* its aid, can facts and circumstances, which in England could at best constitute equitable claims only, and not amount to a bar, be admitted to ascend beyond mere claims here and mount up to a bar, so as to reverse that which, by the rule there, would be the right of the party, and convert it into the right of his opponent; would that be just and reasonable, when it is said as an inducement to the enactment, that a strict application of the rules in England might be attended with injustice? If these rules are exceeded or straitened, does it not become still more unjust?

1846.

Simpson
v.
Smyth.

Such, after the best attention I can give it, I must say is my humble impression of this 11th section. Its provisions run *pari passu* equally in favour of both parties; the want of a court of equity being no fault of either, and each being liable to be affected or prejudiced, owing to its absence; and it reserves to the court about to be established a discretion to relax the rules (by which it must, under the 6th section, have been otherwise governed) in favour of either party, when deemed reasonable and just under all the circumstances; but not to limit their rights within narrower bound, by refusing foreclosure or redemption, where by law the party was entitled thereto.

Judgment.

In my view of the present case, therefore, it turns upon the question, whether the respondents have a right to redeem by the rules established in England? In applying attention, with this view, more closely to the case before us, it is to be observed that *Thomas Smyth* executed the mortgage in fee in 1810, which became

1846. forfeited for conditions broken in 1811. When this security was taken (each party being presumed to know the law) both knew that in equity it only operated as a pledge, and that the mortgagor would have the equity of redemption for twenty years after default.* It was also known to them that there was no court of equity, in which the one could foreclose, or the other redeem; but it was open to the mortgagee to eject the mortgagor, or to proceed on collateral securities; it was open to the mortgagor to tender the debt and interest, or to resist an ejectment, under the statute 7 Geo. II., ch. 20. There were, therefore, other remedies open, but not the opportunity to foreclose or redeem.

Judgment. The mortgagee did not eject the mortgagor, and he remained in possession. In 1818 the mortgagee proceeded to judgment on a collateral security; and, in 1825, the sheriff's sale was made ostensibly of the two lots of land now in controversy. The mortgage had been, shortly before such sale, assigned for a nominal consideration to Mr. *Charles Jones*, as a trustee, it is said, for the mortgagee; and, in such assignment, the right to redeem is distinctly stated. Mr. *Jones*, soon after the assignment, bought the land at such sheriff's sale for £105, being at the time possessed of the legal estate as assignee of the mortgagee. That this sum of £105 was ever paid or tendered to the sheriff, or the mortgagor, does not appear; and, in the absence of proof, it may as reasonably be inferred, it was retained or applied in reduction of the mortgage debt, but inconsistently so applied, if the mortgagee had really purchased the equity of redemption, for that would involve the obligation to satisfy his own mortgage independently.

In 1825 the mortgagor relinquished possession, and in 1826 *Jones* entered. At this period, and not before, the time for redemption began to run against the

* But see the judgment of the Privy Council in this case on appeal, 7 Moore, 206, and which is printed as a note in 6 Grant's Ch. R. 104.

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mortgagor; up to that time things remained in *statu quo*, and in effect it was the same as if the condition had been broken in 1825, instead of 1811. The fourteen years' delay, from 1811 to 1825, was an indulgence or a forbearance on the part of the mortgagee, who might not have been willing to enter and incur the responsibility of a mortgagee in possession, or to forego his unclogged right to proceed on other securities.

1846.

Simpson
v.
Smith.

Now, taking it to be clear that the time for redemption did not begin to run against *Smith* till 1826, when *Jones* took possession, and that he had till 1846 to redeem, the real question is, whether that right was lost in November, 1840, at the end of fourteen years, (when the bill to redeem was filed,) either by the rules established in England, or under the 11th section of the Chancery Act. I do take it to be undisputed, that the time for redemption did not begin to run against the mortgagor, until the assignee of the mortgagee took possession, 1826, although fifteen years after the condition had been broken. And my opinion is governed by this consideration; for, if I were justified in giving it relation to an earlier date, I should be quite disposed to do so.

Judgment.

Assuming then, that the right of redemption existed, and that the time of limitation had not commenced running against the mortgagor till 1826, I do not find authority for holding that right lost by reason of acquiescence or otherwise between that period and 1840, when the bill to redeem was filed. As to mere lapse of time, the respondents had until now (1846) to file their bill, and had the time, by reason of long possession by the mortgagee, been nearly expired before the year 1834, the statute 4 Wm. IV., ch. 1, would have extended it for five years after the Chancery Act was passed, namely, till the 4th March, 1842.

It cannot depend upon mere value, or the consid-

1846.

Slingsby
v.
Smith.

Judgment.

eration how far the mortgagee's debt was an equivalent for the lands at their value in 1826, when the time first began to run. Much stress has been laid upon the value, and as far as material, I look upon the lands mortgaged to have been then worth at least as much as Mr. Jones sold them for—if any thing, more; and it is clear that they rose in value very rapidly afterwards. I do not think acquiescence proved, on the part of the mortgagor or the respondents, or that they slumbered on their rights to a degree amounting to an abandonment in a court of equity. In 1825, the mortgagor relinquished possession on the eve of the sheriff's sale; up to that time his rights as a mortgagor subsisted, and were clearly recognised by the mortgagee in his assignment to Mr. C. Jones; I think he removed the mill irons, which was the only abandonment of possession proved, in the mistaken supposition that the sheriff's sale would operate to foreclose him, and that all right of redemption would be thereby extinguished; therefore, that though he so relinquished the possession voluntarily in one sense, still it was evidently owing to a mistake in law as to his true rights. It is not shewn that he delivered possession, or gave any express assent to the mortgagee's entry in 1826. He knew the possession could be recovered by an ejectment, and appears to have submitted to circumstances he could not avert, and which he ignorantly looked upon as putting an end to his equitable rights. If it be said he must be supposed to have known his legal rights, knowing all the facts, the answer is, so must the other party; but both were in error, and it is obvious he did not spontaneously relinquish or part with any right he really thought he had the power to retain. I do not feel justified in holding what he did under the circumstances an acquiescence that should bind his rights; nor, according to the evidence, did Mr. Sewall the mortgagee; but it appears that afterwards, and when purchasers first offered in 1826, the opportunity of redeeming the estate was generously and liberally offered to the mortgagor;

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and it is shown that he at that period made fruitless efforts to raise the money, or to induce friends to purchase at a small advance, manifesting an anxiety to turn the property to better account, and realise something more from it. In this he could not succeed, and he was himself poor, and without the means of extricating the land.

1846.

Simpson
v.
Smyth.

I do not think any one perusing those portions of the appellants' answers, and the evidence on the defence read at the hearing, can rise from the perusal with the impression that the mortgagor voluntarily resigned his rights, or did more than submit to what he could not evade; he was evidently influenced by the pressure of the sheriff's sale. The only fair application than can be now made of that proceeding is, that it induced the erroneous belief in Mr. Jones and those holding under him, that it might enable them to transfer or enjoy the absolute estate in fee, in law and equity; and to shew that when Jones entered and sold to Hicock, and he to Ward and Jas. Simpson, and they to the appellants, each professed to sell and expected to buy an indefeasible estate, and thenceforward used, occupied, improved and disposed of the premises as absolute owners.

Judgment 1.

In relation to this sale, both parties laboured under mistaken notions as to its effect; and if in itself void and inoperative, the mortgagors so far yielding to it as to dismantle his mill, fearing he would otherwise through its means lose the irons, did not, in my idea of the rules of equity, manifest that deliberate surrender of his rights which should for ever conclude him. If I thought it ought, I would cheerfully give that effect in favour of the parties who have possessed and enjoyed under that sale, in the belief, that though doubtful, it would ultimately be upheld as valid and binding on the rights of all parties concerned. Nor do I consider the right barred by passive acquiescence after the entry of the mortgagee's assignee.

1846.

Simpson
v.
Smyth.

Judgment.

The appellants' evidence, as read, shews, that from the beginning it was looked upon as a doubtful title. In 1826, Mr. Jones held clearly as mortgagee, except in so far as the sheriff's sale might strengthen his title. This, *Hicock, Ward* and the *Simpsons* knew, as shewn by the admission of the defendants, in their answers as read. It appears that Mr. Ward's offer to purchase was deferred till the mortgagor had the previous opportunity to redeem, thus treating it, to a certain extent, as a mortgage still. He did not join in the conveyance, nor was he asked to release his right. Mr. Jones only conveyed the right, title and interest that he had—so did each subsequent party in succession—exhibiting on the face of the deeds or assignments a distrust of the title; or, at all events, a prudent avoidance of guaranteeing any more perfect title than they had. This may have been induced solely by reason of its being a title derived under the sheriff; it was most probably also owing to the nature of the title as a mortgaged estate. It was, however, a safe course of dealing.

When possession was first taken in 1826, the premises were unimproved. In 1827, they were conveyed by Mr. Jones to *Hicock*. In that year, or the following, the Rideau Canal was undertaken. The Rideau Canal Act was passed the 17th day of February, 1827; (a) at this period, Mr. Ward had made some small improvements, when Mr. James Simpson came there as a canal contractor, and became jointly interested in the premises. In 1828, or 1829, lots for a village were laid out, and the parties in possession treated the property as their own. In or about 1830, one of the respondents attended the sale for taxes, and showed thereby that the mortgagor had not entirely abandoned all claim; for *Terence Smyth* then told *James Simpson*, the then possessor and competitor at the sale, that he attended to please his father, who was in his dotage; adding, that he

(a) See Provincial Statute, 8 Geo. IV., ch. 1.

never expected to get the property, and that they had the privilege of redeeming for a long time, &c. 1840.

Wm Jones
v
Smith.

This shews two things, namely, that the mortgagor was old and infirm, (it is clear he was also poor,) and that he still directed his attention to these lands. In 1832, he died. In that same year, *William Simpson*, for the first time, became interested; and his answer as read at the hearing shews the then state of the improvements. He admits knowledge of the nature of the title; and *Mathieson* in his evidence says, that in 1833 one of the respondents told him he still claimed the property. In 1835, overtures to compromise were made by the respondents.

In 1836, an ejectment was brought, (a step that must have been a hopeless effort to regain possession,) and in 1837, the Chancery Act was passed. Up to this time it does not appear that any offer of the mortgage money and interest, or to redeem was made; the only overtures or efforts seem to have been to obtain something in addition to the mortgage debt; and had the £105 bid by *Mr. Jones* at the sheriff's sale, been tendered to the mortgagor in 1825, it is probable he would have accepted it and released his right, or at all events have thereby committed an unequivocal act of acquiescence and approval; but it was not done. The mortgagor in his life-time, and the respondents after his death, may have been unable to redeem at an earlier date; but the property, soon after possession was taken by the assignee of the mortgagee, began to rise in value; and had it remained unimproved, its increasing value alone would have enabled the respondents to raise money upon it, and redeem the property within the twenty years; that, I think, is quite plain on the evidence. Had the money been tendered after 1826, it would have been a useless proceeding, for it is quite obvious that it would not have been accepted. Judgment.

1846.

*Simpson
v.
Snyth.*

In 1837, every impediment to foreclosure or redemption ceased. The appellants did not seek to foreclose, wishing to consider the mortgagor as foreclosed already. The respondents sought to redeem in 1840, fourteen years after possession was taken by the mortgagees. In this (I mean not filing the bill sooner) I see no delay that should conclude them; especially when the events of 1837 and 1838, and the state of the country in 1838 and 1839, are remembered. There is much, I think, (according to English authorities) to preclude redemption as against the purchasers of village lots, especially *Shaw* and others, acting in confidence of what *Terence Snyth* said in his letter of the 10th May, 1832. That letter, however, was, I think, written *bona fide*, and stated clearly the claims of the mortgagor to the property, and gave *Shaw* distinct notice thereof. His opinion as to what his father, then in his dotage, would do, was verified by the event. He does not disclaim as for himself, in the event of his acquiring any right after his father's death; and if he had, a *nude* assurance of the kind, by an expectant heir or devisee, would not at law bind him; and, I apprehend, would not, without more, estop him in equity. It did not influence Messrs. *Ward* and *Simpson* in their purchases; and as to others, whom it may assist in protecting in their possessions, the respondents offered on the argument, through their counsel, to forego proceedings against them, and to confirm their titles.

Judgment.

In addition to the sheriff's sale, and the rights it was supposed to have conferred, and the acts of acquiescence and the passiveness of the mortgagor and his devisees, the appellants rely upon an equity arising out of their energy and labour and large expenditure upon the premises, and their foresight and judgment in promoting a village, to which the principal part of their enhanced value is by them attributed; also the long time they have been in possession, spending the best years of their

lives in improving a property they supposed to be their own, and making by laudable industry a provision for themselves and families. No doubt much is due to their enterprise, exertions and improvements, in raising the value; but claims like these cannot, I apprehend, be suffered to deprive others of their rights, and to change the rights of property; were it a case at law, there would be no doubt. After the respondents had established a clear legal right, it would be vain for the appellants to set up fourteen years' possession and large improvements as a defence; and if the equity of redemption be really looked upon in equity as the title to the property—if the equitable estate is regarded in equity in the same light as the legal estate at law—the same consequence would seem to follow. It would, too, were it a legal title, be open to the appellants to set up at law the defence of acquiescence, &c., though perhaps with less effect than in a court of equity. The prospect of the appellants losing the hold they have so long had and enjoyed, in the confidence that their title was a secure one, no doubt addresses itself strongly to one's sympathies; these things render the duty of deciding painful and anxious. But we must look to the rights of the other side, and in the conflict of opposing claims, determine with firm indifference where the legal right is, and acknowledge it. It is the business of legislation to cure doubtful titles, by general remedial provisions; the courts cannot bend the rules of law or equity to what would look like distorting them, in order to do so in special instances where an imperfect title is attacked.

1846.

Simpson
v.
Smyth.

Judgment

As to the enhanced value of the estate, I certainly think a great deal is to be ascribed to the energy, exertions, and outlay of capital on the part of the appellants; but at the same time I think a great deal more is due to the Rideau Canal, and the settlement and growth of population in the surrounding country; and I doubt not, that if the village and other present improvements had not occurred to the premises, their adaptation to their

1846. present use, would render them of very large value now,
 Simpson in comparison with what they were worth in 1826.
 v. Smyth.

Subsequent events occurring soon after, and following that period, have combined to elevate them. But as respects the enterprise and improvements of the appellants, the cases in the books between mortgagor and mortgagee do not display a sympathy in favour of the improving mortgagee in possession. Looking upon the appellants as mortgagees, and the land a pledge, the authorities discourage, or rather, withhold remuneration for improvements more than are necessary, as calculated to increase the debt, and make redemption the more difficult. They say to the improving mortgagee in possession, you knew the true state of your title—you knew the time open to the mortgagor to redeem—why did you expend large sums in improvements, treat the land as your own, and convert the estate to your own use, without waiting for lapse of time to confirm your title, or obtaining a release or foreclosure to bind the mortgagor and his heirs or devisees.

Judgment.

The utmost time any one had been in possession, when the bill was filed, was fourteen years. *William Simpson* had been there only eight years, and it would appear that most of the village and other improvements have grown since; and now those improvements, and the sales of portions of the estate that have been made within the above periods, are urged as reasons why the appellants should keep all the property—400 acres—notwithstanding the equity of redemption established by the respondents. I do not, on any ground, feel authorised to say, that the right of redemption which clearly subsisted in 1825 and 8, has been lost by subsequent acquiescence or laches, judging, as well as I can, from the imperfect knowledge I have of the rules established in England in relation to mortgagor and mortgagee

On the other hand, were I satisfied that the court is,

by the 11th section of the 7th Wm. IV., ch. 2, clothed with an unshackled discretion, with power to create, as it were, a special equity in this case, regardless of the rules in England, I should be disposed to reverse this decree, in my strong desire to quiet possessions, and to render that a good and perfect title, which in 1826 was (though doubtful) by both parties thought to be valid, and relied and acted upon as such, in the confidence that it could not, or would not, be afterwards disturbed, or that it would be made good by statute. It would, according to my impression of the law of England, and in my view of the counterbalancing equities of the case, be going great lengths; but I think, as the most salutary course, I should be inclined to go thus far.

1840.

Simpson
v
Smyth.

The considerations that would weigh with me, with others mentioned by the learned Chief Justice, are, that the mortgagor had from 1810 to 1825 (fifteen years) to pay the debt, before any attempt was made by the mortgagee to realise it or disturb him, a long and indulgent forbearance, especially if the mortgagor had any other assets tangible by his creditor; that when the sheriff's sale was made in 1825, though an abortive measure, it was supposed to confer a title—at all events, to create an equity—that would be upheld in any future court of equity; that, although Mr. *Charles Jones, Hickock* and subsequent purchasers, knew the state of the titles they bought, and that they were questionable, and made guarded conveyances, still they relied upon the title as tenable after so great a lapse of time; that, before any sale was made by Mr. *Charles Jones*, the opportunity was offered to the mortgagor to redeem or re-purchase, by paying the mortgage debt and interest, sixteen years after the breach of the condition—of which he did not avail himself; such offer being made not as his right, but rather as a reasonable indulgence to him; that, in the state of the property in 1825, it was unproductive, and could be of no use to the possessor, without the previous outlay of much labour and expense in improve-

Judgment.

1846.

Stimpson
v.
Smyth.

ments; that no one would have purchased it under a defeasable title; that, in this country, people are indisposed to purchase long leases of lands situated as these were; and that, without selling the whole estate absolutely, the amount of the mortgage debt and interest could not have been procured for it in 1826, and, as it stood, it was useless to the mortgagee, whose debt since 1810, at six per cent., (the legal rate of interest,) had doubled without, so far as shewn, any part of either the principal or interest having been paid off; that the mortgagee, if disposed, could not have foreclosed; and the mortgagor was not, apparently, in a situation to have redeemed, had there been a court of equity; that the occupiers, by outlay of capital, labour, and exertions upon the premises, (otherwise unproductive,) and regarding them as their own, have contributed largely to enhance their value, and that the enhanced value, from whatever causes, tempts the present application to redeem; that within twenty years of the condition broken (that is up to 1831) no offer to redeem was made, though the rising value, towards the close of that period, was calculated to induce it, and the appellants could not foreclose; that, since 1826 (for fourteen years) great changes have occurred in the surrounding country, and a large village has been established, and extensive works and improvements been made on the premises, altering the former state of things, and rendering the taking of accounts onerous and difficult. I should also rely much upon the expediency of admitting the sheriff's sale (attended, as it was, by the mortgagor's relinquishment of possession) to create a special equity in support of a long possession and *bona fide* purchase, and use of the property as held and owned in fee simple absolute. It is the strongest feature on which I could rely, although, as a general question, such sales be inoperative in law or equity. Looking back to the state of the country formerly, and the absence of an equitable court, and the way in which mortgages often proceeded in days of old, there is much in favour of quieting the appellants' title,

Judgment.

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1846.

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v.
Smyth.

If I felt that I had the ample discretion contended for, I would, however, not hesitate to exercise it; but then I should in future feel called upon to give to other sheriff's sales, made under like circumstances, a similar effect; unless some good reason appeared in the particular instance for regarding them as being inequitable or unjust proceedings.

If I could make a decree as an arbitrator, I would place the appellants in a better situation than I feel authorised to do judicially; but under the 11th section of the act, I think the decree should be modified to the following effect: reciting the respondent's relinquishment of all right of redemption against those who have received titles, or hold under contracts for titles in fee from the appellants, *Ward and Simpson*, to decree an account of mortgage money and interest, and of the improvements according to present value, of what remains the legal estate of the appellants, *Ward and Simpson* on the one hand; and on the other, an account of purchase money received by them, or to be received, upon contracts of sale still executory, &c.

Judgment.

I think *Ward and Simpson* bound to account for the proceeds of sales. The argument against it seems to prove too much; for if, excusable because they only sold such title as they had, it follows that the right to redeem remains unaffected by, or excepted in such sales. It is inconsistent to refuse to call for the purchase money, as being a speculative sale, and then to rely upon such sales as precluding redemption. As mortgagees in possession, had the parcels sold been only *leased*, the respondents would be entitled to the rents and profits; being sold absolutely, they are, confirming the sales, equally entitled to the proceeds thereof. I can perceive

1846. no substantial distinction. The mortgagees had no right to speculate with the respondents' property; as soon as the mortgage debt and interest was realised they should have stopped; all beyond that was surplus, for which they are liable to account.

As to the appellants, *Brice, Lake, Collins and Glass* none of them deny notice except *Lake*, as to the first lot he purchased; but I understand the respondents' counsel, that they were willing to assent to a dismissal of the bill as against them as well as to confirm the titles of the other purchasers not made parties. Upon their cases, therefore, I have not applied separate and especial attention.

Judgment. SMITH, ATTORNEY-GENERAL.—The practice of the law to which I have been accustomed in the Lower Province, is so totally different from that which is pursued in this part of the province, that I cannot be expected to enter into this case at any length in expressing my opinion, or to give any judgment to compare with either of those just rendered by his Lordship the Chief Justice, or Mr. Justice *Macaulay*; and as I have the misfortune to differ from his lordship on one point, I should not have ventured to express this difference of opinion, had I alone differed, but I should rather have coincided in the judgment of the court, under the belief that, the opinion at which I had arrived was an erroneous one; but supported as I am in this opinion by his honour Mr. Justice *Macaulay*, in whose able judgment I fully concur, feel myself constrained to retain the judgment at which I have arrived. The case, in my opinion, hinges on the interpretation to be given to the 11th section of the Chancery Act, and I feel no hesitation in saying, that throughout the whole of the argument, I have been under the conviction, that the 11th clause of that act does not confer on the Court of Chancery the right to refuse redemption, if, under the rules of equity in England, the party seeking redemption could have succeeded; but it only gives

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ON AN APPEAL

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to that court, in granting redemption, the right of making such regulations as may be just and reasonable, under the circumstances of each case. Now there is nothing to shew in this case, that *Smyth* has lost his right to redeem by lapse of time; and there is nothing in the evidence to shew that he intended to waive that right, or acquiesce in the sale of the property. On the whole, I think the equity of the case is in favour of the respondents, and that the decree of the Vice-Chancellor ought to be affirmed.

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*Simpson
v.
Smyth.*

McLEAN, J., concurred in the opinion expressed by his Lordship the Chief Justice.

[The Court being thus equally divided, no judgment could be given; and the cause was ordered to stand over for the purpose of being re-argued.] Judgment.

IN THE EXECUTIVE COUNCIL.

[Before the Hon. J. B. Robinson, Chief Justice; the Hon. Jonas Jones, Ex C.; the Hon. L. P. Sherwood, Ex C.; His Honour Vice-Chancellor Jameson; and the Hon. Mr. Justice McLean.] March 8, 18, and 23, 1846.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between GEORGE STRANGE BOULTON, Appellant, and ANDREW JEFFREY, Respondent.

Where the executive government have examined into and considered the claims of opposing parties to lands leased from the Crown, with a claim of pre-emption, and have ultimately granted them to one of those parties, the Court of Chancery has not any authority, where no fraud appears in obtaining the grant, afterwards to declare the grantee of the Crown a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein. And *quære*, if even there had been fraud, whether the court under such circumstances would have authority to interfere at the instance of the party who had opposed the grant.

Mr. H. J. Boulton and Mr. Esten, for appellant.

1845. Mr. *Sullivan* and Mr. *Blake* for respondent.

Boulton
v.
Jeffrey.

The facts of this case sufficiently appear in the judgment of the court, which was delivered by

Judgment.

ROBINSON, C. J.—The question in this case has been ably argued at the bar, and if we could have brought ourselves to entertain any doubt after looking into the authorities cited, we should in justice to the parties, and because the question is really one of very extensive application, have taken whatever time was necessary for removing the doubt. It is (so far as we know) quite a novel attempt that is made by this bill, to establish that the grantee of the Crown, holding letters patent, may be declared by a court of equity to be but a trustee for another person, whom they may invest by their decrees with the beneficial ownership of the estate, by reason of an equity which they may consider to have been acquired while the land was yet vested in the Crown, and this when the grantee of the Crown is not charged with having done or intended any thing wrong in obtaining the grant, but is admitted to have merely urged his claim to a patent on the footing of right, and when the government, exercising its judgment and discretion, on a full knowledge of all the circumstances, deliberately directed the patent to issue to the appellant; thereby disallowing the claim to a grant which has been advanced by the other party; in other words, that a court of equity may, upon its view of the claims of the parties on which the Crown has decided, overrule the act of the Crown, and defeat the title of the patentee, either partially as in this case, or wholly, as might on the same principle be done in other cases. We cannot derive any other impression on reading the opinion of the Attorney-General, which had been called for by the government, than that his advice to the government was, that *Jeffrey* had no claim either at law or in equity, to insist on a right to be allowed to purchase the acre in question, and that he ought not therefore to be permitted

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to stand in the way of the completion of the sale made to *Grundy*, which was insisted on by *Grundy's* assignee; nor do we think it can admit of doubt, that the government adopted this advice in the same spirit in which it was given, and meant to act fully in accordance with it. It would indeed be dishonouring the Crown, to imagine for a moment, that having made its patent to the purchaser after deliberately considering the conflicting claims, it could possibly be intended by the government to say to the grantee, we did not pretend to decide the question of property in that which we sold to you; we have therefore only considered that we were granting to you the right to represent the legal estate, leaving *Jeffrey* to urge against you any claim to the land which he may have by reason of our previous acts, and those of our lessee, of which we have been fully informed, and upon which, though we have sold the land to you, and have received payment for it, we do not pretend to have determined.

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Boulton
v.
Jeffrey.

Judgment.

It is difficult indeed to conceive a more prolific source of litigation than would be opened in this province, if the patentees of the Crown were exposed to be attacked upon supposed equities acquired by other parties, while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the Crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this is, lies at the root of every man's title; thousands of them have been issuing annually, for nearly fifty years. It is impossible to tell in how many cases there may have been conflicting pretensions, which it was thrown upon the government to decide upon; in some, no doubt, it has not been in their power to grant to either of one or more contending parties, without leaving some hardship to be borne by the other; the utmost care could not have avoided this in the infinite number of such transactions. The mistakes of parties as well as of public officers, and mis-

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v.
Jeffrey.

apprehensions of various kinds, have given rise to opposing claims which called for anxious deliberations in the executive government, and all that could be done at last, was to grant to the party which seemed to be best entitled. Now if it really could be held, that after such determination of the government, and after the letters patent had been issued by their order, the very party whose claims had been considered and overruled by them, could defeat the whole effect of their grant, by obtaining a decree in chancery declaring that the patentee for the Crown held only in trust for him; it is easy to foresee the infinite vexation this would lead to, and the anxiety which must follow. Still, all that would be no argument against this bill, if upon principle it could be supported. It would then be for the legislature, not for the courts of justice, to deal with the inconvenience. *We agree, however, with the argument of Mr. Estlin, that even if it could be charged that the patent had issued improperly, or that the Crown had been in any manner misled, the consequence of that could in general only be, that upon a proper proceeding by the Crown, at the instance (it might be) of the person shewing himself to be prejudiced by it, the grant should be repealed, and thus the land would again be vested in the Crown, which unquestionably must be allowed to exercise its will in disposing of its property.* There would even then be no obligation upon the Crown to issue letters patent to the plaintiff in this case; an obligation, however, which this decree in effect imposes, and by anticipation enforces, by transferring the ownership to a person to whom the Crown had expressly declined to grant the land. "If the land be granted to another, there shall be a *scire facias* also against the patentee." (a)

Upon the other point of this case also, it appears to us the argument is conclusive in favour of the defendant. The two hundred acre lot in question was a clergy reserve; as such, at the time, it was leased for twenty-one years

(a) Com. Dig. 2 Prerogative, D. 80.

to *Buck*; it was subject to the provisions of a British act of parliament, 81 Geo. III., ch. 31, under which it might at any time be annexed by the Crown as an endowment for a protestant clergyman, to be held in fee. *Buck*, therefore, had no ground for reckoning upon any chance of purchasing, and he could confer no claim of that kind, or to the benefit of the alleged clause of renewal, which was not at that time, but was afterwards inserted in leases of *Crown reserves*, and not of *clergy reserves*. That clause affords but a slender foundation to build a claim upon, for with respect to this clergy reserve, the government did not give a right to purchase which could interfere with such disposition of the land as it might afterwards become necessary to make. At any rate, the twenty-one years expired, *Buck* having some years before their expiration transferred to *Jeffrey* his interest in this one acre of the two hundred for the residue of his term, reserving a rent to be paid by *Jeffrey* of ten shillings annually. Then, not long after came the imperial statute, under which the colonial government was authorised and directed to make sale of clergy reserves. *Jeffrey* continued on his acre of land, a mere tenant at sufferance, so far as the Crown was concerned, and having no other footing as regarded the Crown for about six years. Then the government, on an application made to them by *Grundy*, contracted to sell to him this lot. Granting, then, that the government had adopted, as a general rule, the equitable resolution to protect the former lessees in such cases as far as they might consistently with their public duty, still I am not prepared to say, that it is a reasonable or natural extension of such a rule, that the Crown should be expected, still less that it should be compelled, to regard every subholder of their former lessee, of however minute a fraction of the lot, and at whatever distance of time after the expiration of the lease, as entitled to a pre-emptive right of his fraction. I should not have expected that the Crown would agree to prejudice (as it might very materially do) the sale of the whole lot, by allowing a part of

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v.
Jeffrey.

Judgment.

1845. it to be held under a separate title, nor do I think, as regards the person who might have formerly leased the whole lot from the Crown, and assigned his interest in a field, or in an acre of it, that such a principle would be just or reasonable in its application; in some cases it might be, in others not. But here it is in proof, that after this lease had run out, *Jeffrey* actually held as a tenant under *Buttel*, the assignee of *Buck*, and paid a yearly rent of £15; surely then he could not stand in the way of *Buttel* obtaining from the Crown a right paramount to his in this one acre, for he acknowledged him as his landlord. But independently of the objections to his claim in reason, and independently also of the consideration, that it was for the Crown to determine, as they did, conclusively upon his claim, this decree certainly deals more rigidly with regard to the supposed pre-emption right resting on such a foundation as is alleged here, and springing from the mere grace of the Crown, than it would be right to do if the same privilege on no other foundation were claimed as having been conceded by a subject. I do not consider that *Jeffrey's* right to be admitted to purchase is made out conclusively, so that we could found on it any decree in an ordinary case between subject and subject. Whatever his claim was, it was made known to the Crown before any patent issued, and on a review and consideration of all the circumstances, the Crown made the patent under which the appellant claims, and declined to grant to the respondent. There was no equity in *Jeffrey* as against the Crown before the land was granted, and if any unfair conduct in the appellant, in obtaining the patent, would entitle a court of equity to decree a trust in favour of *Jeffrey*, arising out of transactions antecedent to the patent, yet no such misconduct was shewn. It is impossible to hold, that a man insisting openly upon his right, and asking what the Crown gives him with a knowledge of all the facts, is guilty of fraud. That is not indeed pretended, and if a case of imposition on the Crown had been made out, the only result of that would be, that the

Judgment.

Boniton
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patent should be repealed, and the Crown left to dispose of its land as it might find to be consistent with justice. Whereas, this decree makes the grantee of the Crown a trustee for the plaintiff, although no fraud in obtaining the grant is alleged to have been practised by any one, and nothing is shewn that could upon any view of the case be considered to give the Court of Chancery jurisdiction in equity to set aside the grant, and to decree, as is done here, that the patentee shall convey to the person whose interest the Crown has refused to recognise.

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Deulton
Jeffrey.

Per Cur.—Decree reversed, and bill dismissed with costs.

IN THE EXECUTIVE COUNCIL.

[*Before the Hon. J. B. Robinson, Chief Justice; the Hon. Jonas Jones, Ex C.; the Hon. J. B. Macaulay, Ex. C.; the Hon. Mr. Justice McLean; and the Hon. R. S. Jameson, Vice-Chancellor of Upper Canada.*]

March 16, 17,
and April 6,
1846.

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between JOHN YOUNG BOWN, Appellant, and ALDEN BAKER WEST, Respondent.

Indian rights—Rescission of contract.

Where a party, complaining of fraud in the execution of a contract, filed a bill to have it rescinded, and it appeared that after discovering what was alleged as fraud on the part of the vendor, the vendee had continued to deal with the property, the subject of the contract: *Held*, that on that account, if even the fraud had been clearly established, the vendee was not entitled to the relief prayed, and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the Crown, as where the lands have been granted.

Mr. Blake and Mr. Brough, for appellant.

Mr. Sullivan and Mr. Esten, for respondent.

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Howe
v.
West.

The judgment of the court was delivered by

ROBINSON, C. J.—The plaintiff in this cause complains of the defendant having deceived him in the sale of some real property, or rather of the defendant's interest in it; and he prays to have the contract rescinded on the ground of fraud, or that compensation may be made for an alleged deficiency in the quantity of land, which he was led to believe he was acquiring. Enough is disclosed in the case to enable us to see, that the contract between these parties was for the sale of what is commonly called in this country Indian lands, being part of the large tract on the Grand river, in the district of Gore, which the government of the province of Quebec, before the division of the province into Upper and Lower Canada, set apart and reserved for the exclusive occupation of the Six Nations of Indians, who at the conclusion of the American rebellion were compelled to abandon their former possessions in the revolted colonies, on account of their adherence to the British Crown.

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The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants. What particular regulations have been made with this view, was not in evidence in this cause; but we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as it has been made manifest from time to time by orders of council and proclamations, of which all people were expected and required to take notice. In the second year of Queen Victoria, a statute was passed, (ch. 15,) the object of which was to prevent trespasses upon lands reserved for the Indians; it has no provisions which can affect the case before us. But we know that beside this attempt to restrain people from intruding as trespassers upon Indian lands, the government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though

their efforts to that end had been very far from effectual. In the case of Doe on the demise of *Jackson v. Wilkes*, (a) to which his Honour the Vice-Chancellor alluded in his judgment in this cause, the nature of the Indian title or right to this territory upon the Grand river, came under the consideration of the Court of King's Bench, and what was before known to every person conversant with the public acts of the government of Upper Canada at an early day, was in that case proved. This large tract of land on the Grand river, extending from the mouth of the river on Lake Erie, to its source, and comprising a breadth of six miles on each side of the river, having been with other lands purchased by the government from its aboriginal inhabitants of the Chippawa nation, was set apart by the government for the exclusive use and occupation of the Six Nations of Indians; and the intention of the government to retain it always for their use and benefit, was formally declared in an instrument signed by General *Haldimand*, governor in chief of the province of Quebec, in the year 1784, and sealed, not with the great seal of the province, which would have been necessary to constitute it a patent, but with the seal at arms of General *Haldimand*. The government of Upper Canada, acting not by any means in derogation of the rights of the Six Nations of Indians, but acting on their behalf and for their benefit, and upon a full understanding with them, has disposed from time to time of parcels of this territory in order to raise funds for the support and assistance of the Six Nations. In the ejectment case in the Queen's Bench, which has been referred to, *Jackson*, the lessor of the plaintiff, was a purchaser of a small piece of this land which had been thus sold for the Indians through the agency of the government, and he claimed under a patent from the Crown, which had been issued to him in 1835, on the completion of his purchase. *Wilkes*, the defendant, being in occupation of that piece of land, (but by what right it did not appear,) endeavoured to maintain himself in pos-

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(a) 4 Q. B. O. S. 142.

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session by contending that the patent to *Jackson* was invalid, by reason that the Crown had divested itself of the legal estate in the land by the instrument made by Governor *Haldimand*, in 1784, and was therefore not in a condition to make the grant to *Jackson* in 1835, under which he claimed. The Court of King's Bench decided against the objection, for the reasons given in their judgment, and upheld *Jackson's* title, considering that the Crown was not divested of the legal estate by the instrument which Governor *Haldimand* had signed. I am not surprised that it should have appeared to his Honour the Vice-Chancellor to follow, as a consequence of this judgment, that the interest which *Bown*, the plaintiff in this suit, represents himself to have bargained for with the assignee of the Indian, *Duncan*, was not such an interest as can form the foundation for a bill for relief. The truth, no doubt, is, that he and the defendant *West* were bargaining about lands which, though they have been attempted to be passed from one person to another by various transfers, belonged all the time wholly to the Crown; they were lands which the whole of the Indians in a body could not have alienated, because they had no legal estate in them, and of which any individual Indian could still less pretend a right to alienate any particular part.

Judgment.

This was undoubtedly the fact, looking merely at the actual state of the legal title, and without considering the proclamations which are known to have been issued from time to time by the government, forbidding people from presuming to purchase what it was declared the Indians had no right to sell; and which proclamations, though they might not be allowed to affect the legal rights of the parties, might perhaps be found entitled to weight in considering a claim to equitable relief. If the government indeed had been determined rigidly to prevent all trafficking with the Indians for the lands which they were allowed to occupy, they could perhaps not have taken any measure more effectual and expedient

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for that purpose, than by procuring a legislative provision, that no right or interest which any party should pretend to acquire by any such transfer, should be made the subject of any suit or remedy in courts of law or equity. But in the absence of any such enactment, I think we cannot go the length of holding that no equity could grow out of the dealing which the parties in this suit have had, and for this reason only, that the lands, respecting which the plaintiff says he was bargaining, belonged at the time to the Crown; and we are the more unable to refuse to go into the case upon that ground, when we find it relied upon as a part of the plaintiff's case, and not denied, and when indeed every one knows the fact to be, that the government, in proceeding as they have done, to sell portions of this Indian tract for the benefit of the Indians, have in general made it their rule to protect the white men whom they find in possession of portions of the lands under purchases or agreements with the Indians, to this extent, that they reserve to them a right of pre-emption in the lands which they have occupied and improved. This may in some cases, according to the extent and value of the land occupied, be a very substantial interest, and such as a court of equity could hardly refuse to acknowledge when they are applied to with a view to obtaining a remedy against positive fraud. These dealings in this country respecting land of which the legal estate is still in the Crown, or of which the Crown has divested itself after it had become the subject of contracts and agreements between individuals, are very likely to give rise to peculiar equities, which the courts here may have to decide upon without the aid of cases adjudged in England upon the same points. The case of *Boulton v. Jeffrey*, (a) which was determined by this court last year, in appeal from the Court of Chancery, is one of that description; and it seems to have presented itself to the Vice-Chancellor as material to be considered in connexion with the case now before us. But an examina-

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tion of the grounds on which that case was decided, which were fully stated in giving judgment, will show, I think, that we cannot derive much aid from it in deciding the present. What seems to have struck his Honour the Vice-Chancellor as a point in that case which might apply in this, was, that the Court of Appeal objected to entertaining alleged equities as arising out of transactions between individuals respecting lands, the legal estate in which was at the time wholly in the Crown; but that was not exactly the ground. There the king, while he owned the estate, had leased it for a term of years; and the lessee had sub-let a small portion of the land, and had assigned his interest in it, respecting which small portion of the lot there had been several transactions; and afterwards, when the term had expired, and the Crown sold the whole lot to a purchaser, who in regard to any real or supposed right of renewal represented the lessee of the whole lot, the person who held the temporary interest in the small portion under the first lessee, set up a right to be allowed to acquire the fee in that small portion by purchase, to the exclusion of the purchaser of the whole lot. The government took the claims of the parties into their consideration, and on their view of what was reasonable, declined to separate the small portion of the lot from the other on the sale, and made their patent for the whole lot to the person claiming under the original lessee. It appeared to the court, that it would be unreasonable in itself, and would tend to unsettle titles to a degree very unjust and prejudicial, if after the government, in such cases, had decided upon the claims of parties, and had issued their patent upon their view of what each had a right to expect from them, the parties who had been urging their claims before the government, should afterwards be allowed to go behind the patent, and attack each other upon equities growing out of their contracts antecedent to its issuing.

This was one consideration of several on which the

case of *Boulton v. Jeffrey* was decided. To what extent it would be right to maintain that principle, it was not necessary to determine, because the court independently of it, and upon the facts shewn by the parties, was of opinion that the plaintiff did not make out a claim to such a decree as he prayed for; and besides, that case did not, as regards any consideration of this kind, resemble the present, where the Crown has made no patent to either of the contending parties, or to any one, and when other facts on which the bill is founded have not, as it appears, been decided upon by the government, or in any manner brought under their notice. It will be found on examining the case of *Boulton v. Jeffrey*, that the Court of Appeal did not lay down a principle so broad, as that there could not be a suit in law or equity growing out of a contract between parties, respecting an interest in lands which at the time were legally vested in the Crown. Questions of this kind are amongst the most important, from local circumstances, that can arise in our courts. Judgment. It is of great consequence, that we should be as consistent as possible in the view we take of them, and this can be best insured by endeavouring to keep the way clear as we proceed. Upon the merits of the case before us, after the best consideration which I have been able to give to the pleadings and evidence, I coincide in the opinion of the Vice-Chancellor, that he could not properly do otherwise than dismiss the bill.

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The plaintiff's statements in his bill amount in substance to this: first, that the defendant, in the early part of September, 1843, agreed to sell him, for £265, *all the estate, right, title, interest, and possession of him the defendant*, of and in a certain one hundred and thirty-four acres of land in the township of Brantford, which are described by metes and bounds in the bill. Secondly, that in pursuance of this agreement, the defendant did, on the 14th of September, 1843, execute a writing under his hand and seal, by which he granted, bargained, sold, &c., to the plaintiff, his heirs and

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assigns, all the right, title, claim possession, and demand whatsoever of him the defendant, in and to certain deeds of assignment therein specified, which deeds are described in the instrument executed by the defendant, viz.: "of and in the *annexed assignment or quit-claim from John McDonald to the said Abraham Bradley, and from the said Abraham Bradley to Alden Baker West.*" Thirdly, that when defendant agreed (as plaintiff states) "to sell to him all his estate, right, title, interest and possession of and in the one hundred and thirty-four acres described in the bill," and (as I understand the plaintiff's statement) before the deed of the 14th of September, 1843, was executed, he, the defendant, represented himself as having a leasehold, or some valuable and transferable estate of and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof. Fourthly, that the plaintiff paid £112 10s. on account of the purchase money before and at the time of the bargain, and gave his note at seven days' sight for the residue of the £265, agreed to be paid by him as the purchase money. Fifthly, that the purchase having been thus far completed, the plaintiff's agent in the transaction, *Robert R. Bown*, after the execution of the assignment of the 14th of September, 1843, went with the defendant to view the premises, and receive possession. That the then received possession of a tavern, situated on the said tract, which was occupied by a tenant of the defendant; and that the plaintiff believed that the possession so given to him of the tavern, was given as possession of the whole one hundred and thirty-four acres. Sixthly, that some days after this, the plaintiff was informed by one *Hanson*, the tenant of the defendant, and then for the first time learned, that the defendant had only an interest in thirty acres of the one hundred and thirty-four, and had been in possession of no more. Seventhly, that £112 10s., paid by the plaintiff, is more than those premises are worth, of which he obtained possession. Plaintiff charges that the defendant, when he agreed to

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sell him the property, well knew that he had no valuable interest in the whole one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres; that he induced the plaintiff to enter into the agreement by misrepresentations and suppression of the truth of matters within his own knowledge; and that he, the plaintiff, has in fact received no consideration for the promissory note which the defendant holds for the unpaid portion of the purchase money; and he prays to have the contract rescinded, and the note ordered to be delivered up to him; or that compensation may, if he elects it, be decreed by an abatement in price.

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In those parts of his answer which the plaintiff has read in evidence, the defendant admits, that about the year 1834, one *William Parker* was in possession of about fifteen or twenty acres of Indian land, being part of the Indian tract near Brantford, with a dwelling house thereon; that he entered into treaty with *Parker* for the purchase of his right and interest in and to these premises; and that in the course of their treaty, *Parker* produced as evidence of his title to the premises, an assignment from one *Duncombe*, (otherwise, it seems, called *Duncan*,) an Indian, whereby he conveyed to *Parker* all his right, interest, and possession of and in the said dwelling-house, and the land thereto adjoining, containing one hundred and twenty-four acres more or less, as surveyed by Mr. *Lewis Burwell*, and including the cleared and improved land which *Parker* had offered to sell him; and the defendant admits, that he believes the one hundred and thirty-four acres to be the same tract as is described in the plaintiff's bill. That he believed, that by taking an assignment of this deed, which *Parker* held from *Duncan*, and by taking possession of the dwelling-house and cleared land, (which were the immediate objects of his purchase,) he would acquire not only a right to keep possession of the dwelling-house and cleared land, but also a right to enter on the

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1846. remainder of the surveyed tract of one hundred and thirty-four acres, and to take actual possession by clearing and fencing. That under this impression he gave £125 for the purchase, and took an assignment of *Duncan's* deed, and was put into possession of the dwelling-house and cleared land adjoining, and remained in possession from that time till the sale to *Robert R. Bown*, plaintiff's agent.

This is the account he gives of the origin, nature, and extent of his own title. He then says, that while he was thus in possession he cleared and improved about fifteen or twenty acres more of the tract of one hundred and thirty-four acres, and enclosed the whole cleared land, being about thirty-five acres, and built a tavern thereon with out-houses. That one *Bradley*, while defendant was in possession, held the deed from *Duncan* to *Parker*, and the assignment of it to the defendant, as a security for a debt due to him by the defendant; of which circumstance the defendant informed *Robert R. Bown*, who thereupon advanced him £62 10s., in order to enable him to pay *Bradley* his debt, and take up the deeds, which the defendant had told him must be done before he could transfer the writings to him. That the defendant then paid *Bradley*, and got his deeds, including (as the answer says) the deeds from *Duncan* to *Parker*, and from *Parker* to the defendant, (what other deeds besides these there could have been we are left to conjecture, for no other deeds than those two had been hitherto mentioned, either in the answer or the bill.) He says he exhibited these deeds to *Robert R. Bown*, who examined them, and expressed himself perfectly satisfied with them. This is the whole amount of the defendant's admissions read in evidence. On the other hand he denies, in his answer, (folio 27,) that such negotiation as is mentioned in the bill, or any other negotiation than as he the defendant relates, was at any time concluded, "or that the plaintiff agreed to purchase the interest or possession of defendant, or any other estate,

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interest or possession of or in the premises in the said bill mentioned." 1846.

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The defendant states, that when the agreement was made, and until after the transfer by him had been actually signed, he knew nothing of any one but *Robert R. Bown* in the transaction, and considered he was dealing with him as principal, and not with the plaintiff, his son. It is possible, therefore, that in the last section of this part of his answer, he may only intend to deny that he made with the *plaintiff* any such agreement as is stated in the bill; but still he does deny in general terms any negotiations about a purchase, except such as he himself sets out; and in folio 24 of his answer, expressly declares, that except as he has stated in his answer, "no agreement was at any time entered into by and between defendant and plaintiff, nor any agreement by or between any other parties for the sale or the purchase of the premises in the said bill mentioned, or any part thereof;" so that the answer does in fact deny any agreement by the defendant for sale of the premises, except such an agreement as he himself states; and does therefore deny the allegation in the bill, on which the whole equity was founded, that in September, 1843, he agreed to sell to plaintiff, for £265, "all the estate, right, title, interest, and possession of the defendant of and in the one hundred and thirty-four acres of the land described in the bill;" unless the agreement, as it is stated in the answer, amounts to that. That depends upon the construction which it is fair to give the words "*premises*," "*premises aforesaid*," &c., as used in various places between the third and ninth folios of the answer. The point does not seem very clear, and indeed so far as any thing said by the defendant, in these parts of his answer last referred to, could furnish any admission of an agreement not proved by writing, and thus serve to help the plaintiff, were the difficulty created by the Statute of Frauds, it is to no purpose to weigh their precise import, because the plaintiff has not

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1846. made those statements in the answer evidence by reading them. It is only necessary to consider the transfer in connexion with such parts of the answer as refer to them under the saving words, "except as aforesaid," with a view to consider what the defendant can be properly said to have denied on his oath, and what the plaintiff is consequently under the necessity of proving by such evidence as the practice in equity requires.

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Having read over these passages repeatedly, and with attention, I cannot satisfy myself that we can justly understand the defendant as saying any thing more in his account of the bargain, as given in his answer from the beginning to the ninth folio, than that he bought from Mr. *Parker* the premises which he occupied, namely, the house and cleared land of which he was in possession, hoping to acquire, by such purchase and subsequent extension of his improvements, an interest in a further part of the one hundred and thirty-four acres, or in the whole of it, through *Duncan's* deed to *Parker*, of which he took an assignment; and when he states in the fifth folio, that he cleared fifteen or twenty acres more, and fenced the whole clearing of thirty-five acres, and built thereon a tavern and out-houses, and directly after states that *Robert R. Bown* came and offered him \$1000 for the premises aforesaid, I think he means for the premises which he had so described, and which he had reduced to possession, that is, the tavern and cleared land which he could deliver over, and not the unimproved remainder of the one hundred and thirty-four acres, which he had merely hoped to add to his possession in proportion as he could clear and improve it; but which unimproved remainder of the tract (as *Burwell* had surveyed it) he does seem to have been quite willing that *Bown* should have the same claim to that he had, that is the claim of making whatever he could of it, under the writings which he was transferring to him. Thus stands the case upon the bill and answer, in regard to the plaintiff's first allegation as to the extent of the interest and property sold to him, but independently of any question on the Statute of Frauds,

which it will be necessary hereafter to consider. In regard to the plaintiff's next allegation of what the defendant did actually assure by the deed of 14th September, 1843, there is no question, because the deed is truly set out, and speaks for itself. Then as to the plaintiff's statement, that "defendant represented himself as having a leasehold or some valuable and transferable estate of and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof," the plaintiff has certainly not read from the answer any admission of that charge, and the answer (folios 10, 16 and 28,) negatives such representation, not perhaps in terms so precise as it might have done; though when the defendant in folio twenty-three swears that "*except as aforesaid,*" he did not at any time represent himself as having any valuable or transferable, or other estate or interest of or in the tract of land, in the said bill described, (that is the whole of the one hundred and thirty-four acres,) either as being entitled to, or being in fact in the possession thereof; and when there is nothing in the answer acknowledging any such representation, or amounting to it, we cannot say that there is not such a denial of the representation alleged as throws upon the plaintiff the whole burthen of proving it. The statements in the bill, of the defendant having gone after the sale and put plaintiff's agent in possession of the tavern, giving it to him as possession of and for the whole one hundred and thirty-four acres, are clearly and explicitly denied; and as to the charge, which is indispensable to the case as one of fraud, viz., that the defendant well knew, when he made the agreement, that he had no interest in the one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres, he, the defendant, denies that he had ever represented himself to be so entitled, or in possession of the one hundred and thirty-four acres; it was not necessary for him to disclaim any knowledge of his want of interest or title to such

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1846. possession, for the purpose of relieving himself from a charge of positive misrepresentation; but so far as it might be necessary to relieve himself from the charge of fraudulent concealment of his knowledge of the non-existence of certain facts which he must have known the plaintiff to have believed in, and by which he must have supposed him to have been influenced in making the purchase, it would be material to the defendant to deny the guilty knowledge imputed to him, notwithstanding he had made no direct representation inconsistent with it. The answer does contain such a denial, for the defendant swears (folio 57) that except as he had before stated, he did not know that he had not any valuable or assignable interest in the whole of the premises in the bill mentioned, or that he neither had in fact, nor was entitled to have, the possession thereof, nor any greater portion than thirty acres or thereabouts. What he did know on the subject, is what the deeds disclosed, and what he has before stated as to the condition of the premises. Thus the case appears to stand upon the bill and answer.

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West.
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Then we have to consider that the plaintiff grounds his claim to relief on an allegation that the defendant agreed to sell him "all his estate, right, title, interest and possession of and in the certain one hundred and thirty-four acres described by metes and bounds in the bill," and he produced the deed made upon the occasion of the sale, which instead of conveying "*all the defendant's right,*" &c., to any particular one hundred and thirty-four acres of land, merely assigns and transfers all the defendant's right, title, claim, possession and demand of, in and to "*a certain paper annexed to the deed,*" which is therein described as an assignment or quit-claim from one *McDonald* to *Bradley*, and from *Bradley* to the defendant. Assigning all a man's right and interest in a certain tract of land, is a very distinct thing from assigning all his right and title to a certain paper which concerns that land, even supposing

the land referred to in the one case, and in the other to be clearly and completely identical.

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Besides, the deed from *McDonald* to *Bradley* did not assume to convey a title to any land, but only assigned to *Bradley* his right and claim in a certain sheriff's deed or assignment annexed. *McDonald's* deed was made on the 12th January, 1842; the sheriff's deed annexed, was made 29th March, 1838, and purported that upon a writ of *fi. fa.*, in which one *Barry* was plaintiff against this defendant *West* and one *Lodor*, defendants, he, the sheriff, had seized as a chattel of *Lodor's* an unexpired term of twenty-one years, in certain lands specified in an assignment thereunto annexed, dated the 28th July, 1835, from *Parker*; which assignment one would expect to find was an assignment to *Lodor*, but it is in fact an assignment to this defendant *West*, the other debtor in the *fi. fa.*, who it appears did on the 8th February, 1837, assign to *Lodor*, by writing endorsed, all his interest in the instrument executed to him by *Parker*, and the sheriff by his deed assigns to *McDonald*, for £96, as being purchaser at the sale the residue of the term of twenty-one years assigned by *Parker* to defendant *West*; but first created by a deed of the Indian *Duncan*, made 20th December, 1831, granting a lease for twenty-one years to *Parker*.

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Then, when we come to look at the deed by which *Parker* assigned to *West*, and which is the foundation up to that time of all this chain of title, we find it a deed by which *Parker* assigns to *West*, not any one hundred and thirty-four acres of land, but "all his improvements in a certain one hundred and thirty-four acres of land described by metes and bounds" in the deed, and which is the same as the plaintiff described in his bill. There seems to be some confusion in the matter, for this deed, instead of being what the sheriff's deed describes it, an assignment of a term of twenty-one years, is a conveyance to hold to *West* in fee; but

1846. in the *habendum*, as well as in the granting part, the conveyance is confined to *the improvements and buildings only*. I mean that the deed does not profess and assume to make a title to any thing else, but it does in the conclusion add, that the grantor thereby assigns to *West*, his heirs and assigns, "all right, title and interest which he has or can pretend to, to and in *the land above described*, (that is the one hundred and thirty-four acres,) *substituting the said West in his full right to, and place in, the premises above described*," and concluding thus, "turning and transferring from me to the said *West*, &c., the said lands and premises with all that has followed or may follow them." It can hardly fail to strike one here, how differently *Parker*, from whom this defendant received his title, ventured to deal with the one hundred and thirty-four acres generally, and with that part of it which he had cleared and occupied; the latter portion he takes upon himself to convey as people ordinarily convey an estate, but when he speaks of *the lands above described*, including the one hundred and thirty-four, he ventures only to "turn over his right to *West*," and puts him in "*his place*," with "*all that may follow them*." I mention this as tending to make very probable the defendant's statement, that he had made his agreement with the plaintiff with similar caution to that which had been used in selling out this non-descript title to himself. When *Parker* made this deed to *West*, he held a deed dated 10th March, 1834, made by the Indian *Duncan* to him, assigning as *Parker* afterwards did his *buildings and improvements made on the one hundred and thirty-four acres*. And this deed is more remarkable, because *Duncan* covenants only that "*he is the true owner of the improvements and buildings, according to the custom of the Indians by his own labour having made the same*," and he therefore takes upon himself to convey the buildings and improvements to *Parker in fee*, and to give this covenant that he had a right to sell them. But in the same spirit that *Parker* afterwards acted in assigning to *West*, he quits

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claim and surrenders up in addition, all the right and interest (whatever it might be) which he had to the whole described tract of one hundred and thirty-four acres; engaging that if ever the Indians should yield up the land to the King, whereby *Parker* might have an opportunity to purchase, he would do nothing to oppose his claim, and would not cause or advise any other Indian to make claim to it; but as far as he could, he would protect him in the peaceable possession of it. It does not appear from these papers from what quarter the sheriff could have taken his idea of a term of twenty-one years; but the document printed as exhibit K. explains it. That was a deed made 20th of December, 1831, by *Duncan Parker*, leasing for a small annual rent, for twenty-one years, two hundred acres of land described by metes and bounds, *which carry the limits on one side "to the farm or land occupied or possessed by the widow Tuttle"*—(which is important as shewing that no one, claiming under this deed at least, could suppose he had a right to interfere with Mrs. *Tuttle's* possession.) In this deed *Duncan* covenants, that *Parker* shall enjoy all the premises demised during the term. Of course if the one hundred and thirty-four acres, as described, form part of the tract described in this lease, then the deed to *Parker*, in 1830, from the same person, of all his interest in the lands, would extinguish the term that was by this deed granted to him; but still as the sheriff did sell the residue of a term only, specifying its commencement and duration, and not *all the interest* which the debtor had in the land, and sold it under a writ against chattels, which can only operate upon a term, we cannot look upon this plaintiff as being entitled to more under the said assignment of the sheriff's deed than the deed could convey, and nothing more is in fact assigned by defendant's deed to the plaintiff, than the mere "*deeds or writings*" from *McDonald* to *Bradley* and *Bradley* to *West*. And admitting that we can by construction understand the assignment of those deeds to be an assignment of the

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1840. estate and interest conveyed by them, still that interest is nothing but an unexpired term of twenty-one years, and not what the plaintiff states it to be in his bill, an assignment of *all the defendant's title*, and interest in the one hundred and thirty-four acres of land; and if when the sheriff's deed is so precise as this is, selling only the residue of a specific limited term, we could extend the effect of the sale and conveyance so as to make it embrace all that the deed from *Parker to West* could cover, both as to estate and quantity of land, (which I think we could not do,) then we must see what the effect of that deed is; and we find, as I have already stated, that all that it pretends to convey or assure absolutely is *improvements or buildings*, and that as to the rest, it merely gives over whatever claim *Parker* had.

Judgment.

The plaintiff does not complain that he was imposed upon by being drawn in to sign a deed fraudulently made by the defendant, to express something different from what was intended by him; nor does he pray for relief on the ground of mistake. It was the plaintiff who drew the deed which the defendant signed, and the deeds which are referred to in it were in his hands. If under such circumstances he could come for relief against the deed, on the ground of imposition or mistake, he does not come with any case of that kind; but he asks us to look upon him as having purchased one thing, when the deed drawn by himself, and which he does not complain of as being executed under any circumstances of fraud or mistake, in regard to what it contained, shews that he purchased another thing. This then is a plain case of seeking to add to, or alter, a written instrument by parol evidence, not an agreement alleged to be subsequently made by parol, and modifying a prior written agreement; in which case such evidence might be received at least to rebut the plaintiff's equity, when he is praying specific performance; (a) but the plaintiff

(a) *Legal v. Miller*, 2 Ves. 299; *Pitcairn v. Ogbourne*, 2 Ves. 375.

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(a) *Rich v. J.*
Anspach, 5 Ves.
Ansell, 3 Wills 2
Sherwood, 1 Ves.

tells us, that the sale, when it was made, was not really the sale of such an interest as the deed imports, but of something more extensive. This is doubly objectionable: it puts forward a parol agreement for an interest in land which the Statute of Frauds requires to be in writing, and puts it forward to overrule the deed which *was executed* between the parties as the evidence of the transaction, thereby violating a principle of the common law. It is to no purpose to examine whether such a parol agreement has been proved by the witnesses, for such evidence could not legally be admitted. If there had been no deed or writing, then the only question would be, whether the defendant has by his answer admitted a parol agreement such as the plaintiff sets out, and submitted to abide by it, waiving any objection under the Statute of Frauds. I think we cannot say upon reading the answer, that he has done so; and I take it to be clear that a case of this kind could not be helped by part performance, because it is a part performance in favour of the plaintiff, so far as taking possession goes; and as to the payment of the money by the plaintiff, it is only evidence that there has been an agreement to sell, which the deed itself imports; it is consistent with the deed, and furnishes no excuse for travelling out of it in order to set up by parol evidence a different contract. Otherwise, where a man had paid money upon a purchase of a lot of land, and taken a deed for it, he might, under the pretence of part performance, offer parol evidence, that he had bought two lots instead of one.

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Indeed I look upon the Statute of Frauds as being out of the question here, strictly speaking, because there has been not only a writing, but a solemn deed executed in evidence of this transaction; and to that the parties are held, (a) so that the question is not whether there

(a) Rich v. Jackson, 4 B. C. C. 514; Le Texier v. The Margrave of Anspach, 5 Ves. 334, 328; Lockwood v. Ewer, 2 Atk. 808; Meres v. Ansell, 3 Wills 275; Lord Irnham v. Child, 1 B. C. C. 92; Hare v. Sherwood, 1 Ves. 241; Frewen v. Relfe, 2 B. C. C. 219.

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should not have been a writing, but whether when there has been a writing, it can be passed by and rendered of no avail to the defendant, by setting up a parol agreement different in its terms, as having been made before or at the time of the deed being executed; and this without any allegation of fraud or mistake in the wording of the deed. If there had been no writing between the parties, and the only difficulty had been that presented by the Statute of Frauds, we should then have had to keep in view the distinction established by many decisions, between receiving parol evidence of a contract respecting an interest in land for the purpose of rebutting an equity, upon which a plaintiff is seeking to obtain a decree of specific performance, or is praying for any other interposition of a court of equity, in order to change the situations in which the parties would stand at law; and the receiving parol evidence as the foundation of a plaintiff's case, when he desires the active interposition of the court in his favour, to enforce the performance of an alleged agreement respecting lands, such as can only be proved by a writing, and of which he has no written evidence. In the latter class of cases, the courts feel bound to acknowledge the obligation of the statute, because it applies directly and in terms; in the former they have felt themselves at liberty to say that the Statute of Frauds does not direct that every agreement in writing respecting lands *shall be* enforced in equity, whether it be just or unjust; but only that no person *shall be charged* either at law or in equity upon any agreement, respecting lands, which is not in writing; and wherever there is parol evidence, which satisfies the court that the plaintiff is desiring to enforce an agreement against the honesty of the case, they decline lending him their assistance, leaving him to prosecute his legal rights as he can. Here, I think, the plaintiff fails in the very foundation of his case, for he charges an agreement respecting lands, which he does not shew by legal evidence, and while it is shewn on the contrary by writing, that the agreement which was

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made was essentially different. It is not material to consider whether the charge in the bill of the plaintiff being induced to enter into the alleged agreement by a fraudulent misrepresentation, or concealment of facts, is supported by proof; because, if no such agreement, as the plaintiff alleges, can be legally held to have been entered into, it becomes idle to enquire about the inducements to do that which was not done. In point of fact, however, I do not see that there is satisfactory evidence of such misrepresentation or concealment as is alleged respecting the defendant's title to, and possession of, the one hundred and thirty acres. The bill does not charge that the defendant said he had seventy acres cleared, but only describes the tract as having in fact that proportion cleared; and as no such representation is in issue, the evidence of witnesses on that point signifies nothing; and besides, it is not proved how much of the land is cleared. Looking at all the evidence, if the case turned upon a proof of such a fraudulent misrepresentation or concealment as is alleged, I cannot say that I should feel satisfied with the proof of it, so as to feel warranted in making the fraud charged the ground of a decree. For such a purpose, the evidence should be clear and conclusive; for fraud is not to be imputed to a man upon probabilities, or slight surmises, or upon a nice balancing of evidence.

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There is a good deal in the accounts given by some of the witnesses, to throw suspicion on the defendant's conduct in this transaction. After reading the evidence, I am not satisfied that it was perfectly upright, and that he was open and candid, but it would not be enough to have doubts on that point; we should see some clear misrepresentation or some undoubted suppression of a material fact. Now here, as to the defendant representing that he had some valuable interest in the whole one hundred and thirty acres, there can be no reasonable doubt upon *Bradley's* evidence, nor indeed without it, that the elder *Mr. Bown*, who made the bargain, knew perfectly well

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what was the nature of the defendant's interest in these Indian lands, if it could be called an interest; there is nothing to fasten upon the defendant a precise allegation that the whole one hundred and thirty acres was held by him under the same circumstances, and with the same strength of claim from actual occupancy, so that he could transfer as good a claim in every part of it as he could in the cleared land. Mr. *Bown's* evidence, and Mr. *Walter Bown's* evidence, prove nothing more on this point than what is very probable, that he spoke of his deeds as covering one hundred and thirty acres, and so they did. The deeds were in the hands of the agent, and open to the inspection of the plaintiff; they explained the nature of the case fully. Mr. *Bown* expressed himself satisfied with them, and drew himself the deed, after reading them, which the defendant signed. I do not see what room there would be for the application of the doctrine of *caveat emptor* in any case, if the purchaser with such deeds as those before him, and declaring himself satisfied with them, could complain afterwards, upon any thing that is here shewn by the plaintiff, of the interest not being such as he expected. In point of fact, for all that is proved, the legal interest is the same in one part of the estate as in another; and so far as actual cultivation and occupancy was necessary to strengthen what was a mere claim to the indulgent consideration of the government, the plaintiff and his agent, or his agent at least, must well have known that the one hundred and thirty acres were not all occupied and improved; they lived near the property, saw it often, had every opportunity of viewing it, and they had its exact boundaries expressed in writing. As to the alleged misrepresentation by the defendant, that he was entitled to the possession, and was in fact in possession of the whole one hundred and thirty acres, it certainly is not proved that he made any such statement; and if by possession he meant actual visible enjoyment and use of the land, it would have been absurd in him to have made such a statement, for the parties with whom he was to

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tracting knew that the fact was otherwise. Indeed, in the argument, the equity of the plaintiff's case was rested rather upon an imputed fraudulent suppression of the fact, that another person or other persons were in possession of parts of the one hundred and thirty acres adversely to the defendant's claim, than upon any actual misrepresentation made on that point. But as weak a part as any of the plaintiff's case, and perhaps the weakest, is that we are not shewn, nor is it even stated by the plaintiff in his bill, what other person was in possession of any definite portion of the one hundred and thirty-four acres, excluding him from that portion, nor the right or claim of such person to possession, nor whether he persisted in keeping the plaintiff out, nor whether he had the power to do so, nor whether the plaintiff had found that in consequence of such possession his claim to pre-emption in such portion of the land would not be recognised by the government, nor what disadvantage he had suffered or was likely to suffer by reason of the possession of any person. The plaintiff says he for the first time learned from *Hanson*, that defendant had only been in possession of thirty acres; that he *ascertained*, afterwards, that that information *was correct*; but that is no positive and direct affirmation that any other person *was in possession* of any particular part of the land; and for all that is stated in the bill, and even for all that is proved, there may be in fact no other person in possession of any considerable portion of the land upon such a claim as the government would prefer to that which the defendant had held; or the plaintiff might, for all that he has stated or proved, find no one resolved to contest the possession with him in any part of the one hundred and thirty acres, if he were to go forward and assert his right. Surely the plaintiff should have charged and proved not merely that the defendant had not been *in possession* of all the one hundred and thirty acres, but that some other person to his knowledge was in actual possession, or had a better title of a certain part, which

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1846. he maintained to the prejudice of the plaintiff. And yet if the plaintiff had made out a *prima facie* case of misrepresentation by his bill and evidence, Mr. *Burwell's* evidence, it appears to me, must destroy it, unless we take upon ourselves to discredit him, or unless we treat his testimony as inadmissible; for he swears distinctly that before the bargain was concluded he made the plaintiff's agent fully aware of the very facts which he now complains of, (so far indeed as he can be properly said to complain of any specific grievance,) and that the agent admitted to him that the defendant had made him acquainted with it all before. Of course if his evidence is admitted and believed, it would make an end of the case upon the broad merits, and independently of all legal and technical objections. With regard to rejecting Mr. *Burwell's* account as incredible, I see nothing which would have justified the Vice-Chancellor in doing so. He knew perfectly well the nature of such matters as he was speaking of; he had been employed by both parties in the course of these transactions, and he is not shewn to be connected with either, or to have any interest whatever on either side. It would certainly be strange if a court were to rescind the contract between these parties on the ground of fraud, in the face of all his clear and direct testimony under oath, showing that no such ground existed. How could the court arbitrarily look upon him as unworthy of belief, merely because the agent denies his statement, when no attempt was made to impeach his character. If the story he tells were hard to be believed, from its extreme improbability, that would furnish a ground; but we can surely have no difficulty in thinking it possible that the plaintiff would, with a full knowledge of all that he now complains of, make the bargain that he has made, when we find it proved that after all *he is receiving an annual rent of £37 10s., for the tavern and thirty-five acres, of which he was put in possession, and for which (if he made good no claim to any more land) he will pay £265. A purchase that yields more than fourteen per cent. interest*

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on the cost, certainly raises on the face of it no evidence of a fraud upon the purchaser. We can very readily believe that the plaintiff, or any one, would willingly consent to close the bargain on the understanding that he was to be clearly in the possession of the tavern and thirty-five acres of inclosed land, and to take his chance (as the very deeds placed before him clearly shewed he must do) of getting the rest of the one hundred and thirty-four acres; and it is remarkable, that while no witness gives any certain account of there being any more of the one hundred and thirty-four acres cleared and occupied than that which the defendant held, and which he delivered over into the plaintiff's possession, the defendant swears distinctly and positively that there is none. But it is contended that Mr. *Burwell's* evidence of his conversation with the plaintiff's agent, before the bargain was concluded, is not receivable. He was a witness for the defendant. The plaintiff relies on his evidence for the purpose of establishing that the defendant had not been in possession of all the one hundred and thirty-four acres, and that some one else had been long occupying a part. What he did say on that point is not satisfactory, and could not prevail alone over the distinct denial in the answer, that there was any improvement beyond the defendant's thirty-five acres; but I do not see that the plaintiff could be allowed to use his evidence for establishing *that* fact, and at the same time object that he could not be a witness at all, because he had not been called to speak to any thing that was put in issue by the pleadings. But surely this part of Mr. *Burwell's* evidence does bear distinctly upon the main point in issue, viz., the alleged fraudulent misrepresentation; for if it be true that the agent, before he completed the purchase, acknowledged that the defendant had informed him accurately of the condition of the property, what becomes of the fraudulent misrepresentation or concealment by which he charges he was imposed upon? It is hardly worth while to go minutely into these questions, for the plaintiff's case is in my opinion so

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wholly unsustainable, and on several distinct grounds, that it is unimportant to dispose of every doubtful point. If the plaintiff could have proved by legal evidence, and had proved such a contract as he stated, and that the defendant had fraudulently misrepresented or concealed some specific facts; and if the true state of these facts had been stated in his bill, and proved by evidence; and if he had shewn that the fraud of which he complained was such in its effects that he could not have under his contract that which he was entitled to expect—still there would remain not merely the consideration, that for all that appeared he had made an exceedingly good bargain, and had got more than the worth of his money, but this more material consideration, that after he had discovered the true state of things according to his own admissions, so far from repudiating the contract on the ground of fraud, he has acted upon it, as if it were valid, has leased the property through his agent, and has received rent upon his lease, and at this moment uses and enjoys it as his own, not even shewing that he had before done what he could to abandon it. We could not possibly hold that there is no consideration for the note which he has given, while he thus retains the possession of his purchase, and has done so for more than two years, receiving rent from a tenant, to whom he has made a lease since his knowledge of the alleged fraud. Upon this point I refer to the very strong case of *Campbell v. Fleming et al.*, (a) In that case the plaintiff had purchased some shares in a mining company, upon representations contained in printed advertisements, and which were grossly fraudulent, and the whole scheme was a deception; but after discovering the fraud he nevertheless disposed of some of the shares so as to realise a considerable sum of money. After he had done this, he discovered for the first time a new feature in the fraud, viz., that an outlay on the mines, which the vendors had stated to him amounted to £35,000, had not in fact amounted to

(a) 1 Ad. & Ell. 40.

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£5000. In consequence of this he brought an action to recover back his money, his counsel contending that as it was clear the transaction was a fraud *ab initio*, no contract could arise upon it; and that even admitting that the plaintiff could waive the fraud and adopt it as an existing contract, yet he was entitled to repudiate it on discovering a fraud of which he was before ignorant, and which he therefore could not be held to have waived. He was nonsuited at the trial, and the court all concurred in the propriety of the nonsuit. *Littledale, J.*, said, no doubt there was at the first a gross fraud on the plaintiff, but after he had learned that an imposition had been practised upon him, he ought to have made his claim; instead of doing so, he goes on dealing with the shares, *Parke, J.*, says, "after the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he lost his right of rescinding it." The fact of the discovery of a new fraud was a strong one, which does not exist in this case; but the court were unanimous in holding, that even that could not overcome the fact of the plaintiff having acted on the contract as valid, after discovering that he had been imposed upon. *Patterson, J.*, meets the whole case in very explicit terms, and I think what he says applies with irresistible force to this plaintiff: "No contract," he says, "can arise out of a fraud, and an action brought upon a supposed contract which is shewn to have arisen from fraud, may be resisted. In this case the plaintiff has paid the money, and now demands it back, on the ground of the money having been paid on a void transaction; to entitle him to do so, he should at the time of discovering the fraud have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived." It is impossible that we could treat as a

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repudiation of the whole contract, the arrangement which the plaintiff alleges, but has not sufficiently proved, that he was in treaty with the defendant's agent for converting the purchase into a transaction of a loan, which would have given the plaintiff about £85 a year for the interest of £112 10s., a proposition which the defendant swears was not made to him, and which according to what the plaintiff has shewn, was not professed to be grounded on any repudiation of the former contract as fraudulent. The evidence of the plaintiff having leased to one *Leonard* by the year, the tavern and thirty-five acres, is given by *Robert R. Bown* himself, the plaintiff's witness and agent; and it is evidence that must, I think, be admissible under the pleadings upon that part in this case which charges that in consequence of the fraud practised the plaintiff has no consideration for the note given by him. There were some points discussed in the argument connected with the evidence which I have not entered into, but I have carefully considered all the evidence. It is in some points inconsistent, and it is in general very inconclusive; the facts upon which it would be necessary that the court should be precisely informed, are not brought out; and in my opinion it is not in any one essential point so satisfactory upon the merits as to have warranted a decree in the plaintiff's favour, if there had been no legal difficulties in the way occasioned by the rules of evidence. The principles which govern the administration of equity in cases of fraud, were correctly and forcibly stated by Mr. *Blake* on the part of the plaintiff, and were not contended against by the defendant. The question turns, as is commonly the case, upon their application to the facts. The position cannot be denied, that a person inveigled into a contract by a fraudulent misrepresentation is entitled to have it rescinded, and that although a vendor may not commit himself by any positive representation, yet his suppression or concealment of material facts within his knowledge is equally a fraud, and will equally invalidate the contract; but

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except in very plain cases, questions may arise depending upon the subject matter of the contract, the spirit in which the representation was made, as for instance, whether the seller was merely in general terms commending his article, as dealers commonly do in the course of their trade; whether the defect which has been discovered, was latent or patent, and if patent, whether the buyer had fair opportunity to inspect for himself, so that he could be treated as purchasing upon his own judgment; or whether he so clearly relied upon the statements of the seller, as to have acted wholly on that confidence, and so to have saved himself from the application of the maxim "*caveat emptor*." In the case before us, besides discussing these points, it was thought essential to the plaintiff's case to urge, that if the defendant were found by the evidence to have made assertions to the plaintiff respecting the extent of his possession, such assertions, though made after the contract was completed, might supply evidence of deception before the contract, by affording a reasonable presumption of what the defendant had undertaken to convey; and further, that conversations preliminary to the contract might furnish good evidence of what the sale made afterwards was intended to transfer; and that a wilful suppression of material facts bearing upon the value of the estate, in the course of such preliminary negotiations, would invalidate the contract, not on the ground of fraud intrinsic in the contract, but fraud extrinsic in the inducements which led to the contract. Admitting that the authorities cited on these points would justify us in carrying these positions to the full extent contended for, and even in the case of a contract carried into execution by a deed executed between the parties under all the circumstances found here, still I consider that this consequence only would follow, that the plaintiff was in a situation to shew a good case for equitable relief, by stating the contract truly as it stands in the deed; that is, that he had bought from the defendant "*the assignment or quit-claim from McDonald to Bradley, and from Bradley to defendant;*"

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in other words, the paper title transferred under the sheriff's sale ; (let that be what it might ;) that he had been led to buy such right or claim by the defendant's assurance that he was in actual possession of the one hundred and thirty-four acres ; that the fact was, that at the time of such purchase made by him one — was in actual possession of a certain part, to wit, — acres of the said one hundred and thirty-four acres, to the exclusion of the said defendant, and claiming adversely to him ; and that although the defendant well knew that fact, yet he fraudulently concealed it from the plaintiff, and so induced him to make the purchase in ignorance of the truth. Instead of this, however, he stated the contract (which we can only take from the deed) untruly, by asserting that he agreed to buy from the defendant *all his estate, right, interest, and possession of and in the land, &c.* If the Vice-Chancellor had thought fit to direct an issue at law, in order to ascertain what the defendant actually did sell, I conceive that the deed, and that alone, could have been legally received as evidence upon that point ; and the rule applies equally in equity, when the deed was executed deliberately, and was even drawn by the vendee or his agent, with the prior titles in his hand, shewing what interest it was that the vendor could pretend to convey ; and when no fraud is charged in the wording or execution of the deed itself, a court of law would undoubtedly say: "We cannot hear verbal accounts from witnesses of what passed before the making of the deed, as to what one meant to buy or the other meant to sell ; they may have had various intentions and various degrees of information as to their respective claims and expectations at different stages of the negotiations ; but what they did at last settle down in, and what the one actually bought and the other sold, we can only learn from the deed ; otherwise there would be no use or safety in written instruments." And it certainly is my impression that a plaintiff resting his case at law upon the assertion of such a contract, as the plaintiff has stated in the commencement of this bill, must on

the production of the deed be nonsuited, for there can be no two things more distinct than selling all a man's right *to or under a certain paper title regarding a term of twenty-one years in one hundred and thirty-four acres of land, and selling all a man's right, title, and possession in the same land.*

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To be sure, the fact may be, that the vendor may have no other right than under the paper title referred to, and in that case the transfer, as the deed states, would assign in effect all his right: but how that fact was we are not to conjecture or assume, and cannot learn it from parol evidence, in order to make the deed speak a wholly different language from what it does speak. I revert to this point in the case which I have before noticed, because it is in my opinion an objection lying at the foundation of this case, which could not be got over, and which, as well as several of the other difficulties in the plaintiff's way, applies as much against the making a decree on the principle of compensation, as against a rescinding of the contract. Judgment.

In my opinion the judgment of his honour the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

The other members of the court concurring,

Judgment below affirmed, and the appeal dismissed with costs.

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September 3
24, 1846, and
Jan. 4, 1847.

IN THE EXECUTIVE COUNCIL.

[Before the Hon. the Chief Justice; the Hon. J. B. Macaulay, *Ex C.*; and the Hon. Jonas Jones, *Ex. C.*]

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between MARGARET BROWN, EXECUTRIX OF JOHN BROWN, DECEASED, *Appellant*, and DAVID SMART, WILLIAM KINGSMILL AND OTHERS, *Respondents*.

Principal and agent—Payment—Specific performance.

A. authorised his agent to sell his estate for £500 *cash*, and the agent instead of receiving *cash*, accepted bills from the vendee, drawn on his, the vendee's agent in Europe, which bills the agent applied to his own use, by transmitting them to his correspondents, to whom he was largely indebted, and who placed the proceeds, when honoured, to his credit. *Held*, reversing the decision of his honour the Vice-Chancellor, that A. was not bound by such acts of his agent, that this was not a payment to A., and that until he received the amount of the purchase money in *cash*, he was not bound to execute a deed of the premises.

Mr. Sullivan and Mr. Vankoughnet, for appellant.

Mr. Blake and Mr. Esten, for respondents.

The judgment of the court was delivered by

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ROBINSON, C. J.—Mr. John Brown was resident at Port Hope; Mr. Bethune, a merchant, was living a few miles distant, (at Cobourg,) between whom and Brown there had been large transactions, involving purchases and sales of land, in which Bethune acted as agent for Brown, making bargains for him, and receiving the purchase money, as the evidence shows, though whether under a general authority, or by special instructions in each case, does not appear. They had also transactions together in bank paper, negotiated by Bethune for Brown's benefit, upon his own responsibility and Brown's.

Brown owned a lot of land situated within a mile or two of his place of residence, on which he had a tenant, one *Wilder*. This farm the late *Dr. Innes*, who had recently arrived in this country, wished to buy, and he spoke to *Mr. Brown*, it appears, about it, who told him that his price was £650; he afterwards spoke to *Bethune* on the subject, and in consequence, *Bethune* writing to *Brown* in September, 1833, upon other matters of business, makes this communication and enquiry in his letter: "*I shall probably sell your Wilder lot, shall I take £500 cash? Let me know per bearer.*"

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On the 16th of September, 1833, *Brown* writes to *Bethune* on some other affair, and in relation to the question about the *Wilder* farm, says: "the *Wilder* farm cost me more than £500, with the interest and expenses since I got it. As times are turning out, take that sum if you can do no better; I ought to get £650 for it." *Bethune* closed a bargain for £500 with *Innes*, who on the 28th of September, 1833, gave him two bills of exchange, each for £250 sterling, one at three months, the other at four months, drawn by *Innes* on parties in Scotland, payable to *Bethune* or his order; which bills were immediately remitted by *Bethune* to his correspondent *Bradbury*, in Montreal, with instructions to send them to Scotland, and place the proceeds to *Bethune's* credit, he being then indebted to *Bradbury* in a much larger amount.

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Bethune was at that time doing a large business, and was supposed to be perfectly solvent. In the winter of 1834 he was found to be insolvent, and it was then discovered that his affairs had been in confusion for some time before this transaction.

The bills were duly honoured at maturity, and were placed by *Bradbury* to *Bethune's* credit.

In the spring of 1834, after *Bethune's* failure had

1846. occurred, and was publicly known, and after transactions of business between him and *Brown* had ceased, *Innes* became uneasy about his deed, which he had looked to *Bethune* for, and he pressed him on the subject. On the 3rd of April, 1834, in consequence of these communications which he had had with *Bethune*, he wrote to Mr. *Brown* the following note :—

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“I received of Mr. *Bethune* the enclosed, of which retaining a copy, may I request you to send a written answer, as it is of some importance to have it in good time. The messenger is desired to remain for your leisure. Mr. *Boulton* wishes we could, as Mr. *B.* has returned home, soon meet and explain this matter, to me a very unpleasant one. I have not yet done about my bills being on Jamaica and dishonoured.”

“ROBERT INNES.”

Judgment.

(This last sentence, I presume, relates to some other matter.)

Mr. *Bethune's* letter to *Brown*, which *Innes* referred to as being enclosed in his, and which he had evidently read and retained a copy of, is in these words :—

“Dr. *Innes*, who purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid, I shall account to you for the amount, £500. *This transaction is entirely out of our other business.* I sent the bills to Scotland through *W. Bradbury & Co.*, and the moment they advise payment, I can draw for the amount, if you will make a title to the land, and leave it with Mr. *Moffatt*, to be given up on your order.”

This letter is signed by Mr. *Bethune*.

On the next day *Brown* replied to *Innes* as follows :

“Dear Sir—I have your favour and inclosure from

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Mr. *Bethune*, in reply, I beg to say, that I cannot make a title to the lot you purchased until I get the pay, there being a mortgage due to *Jonathan Walton*, Esquire, of Schenectady, with interest, nearly £200, which must be first discharged. At the time I consented to take £500 for the lot, it was to be cash down; and were it not that I was in great want of the needful, I would not have offered it for any such sum; however, as the matter now stands, although much disappointed as I have been, at not getting the pay at the time I expected it, I will take no advantage by demanding a further sum than the £500 with interest from the time you took possession from *Wilder*, although the rent I was getting much exceeded the interest. I hope it may not be long before the money comes to hand."

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Brown alludes in this note to *Innes's* having taken possession of the farm from *Wilder*. The evidence respecting that is, that *Innes*, who had lately come to this country with his family, was advised by a friend to endeavour to get into possession of the farm at once, and thereby save the expense of going elsewhere with his family; that he applied for that purpose to *Wilder*, who was in possession, it seems, under a lease from *Brown*, but *Wilder* declined to go out unless *Innes* would consent to pay to *Brown* a small amount of rent then due; that *Innes* repeated this to *Bethune*, and it was settled between them that *Innes* should give an order on *Bethune* in *Wilder's* favour for the amount of rent, which he did, and *Innes* thereupon obtained possession about the 10th of October, 1833, and continued in possession. About the end of 1835, as I infer from the evidence, though the time is not precisely stated, *Innes* died, having made a will on the 2nd of November of that year, devising to *Eliza Innes*, his wife, "all his property, mixed, freehold and real, in trust for her sole use, purpose and behoof, towards the education of his four children," who, with the widow and his executors, *Kingsmill* and *Smart*, are the respondents in this suit. The

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Judgment.

widow, *Eliza Innes*, remained in possession after his death, and in April, 1836, the executors paid to *Jonathan Walton* the amount due upon the mortgage mentioned in *Brown's* letter to *Innes*, and took an assignment. One of the objects of the present suit was to compel *Brown* to repay to the estate the amount of that incumbrance; and *Brown* on his part filed a bill in 1839, for redemption against the executors. In 1836 or 1837, *Innes* having died without obtaining a title, and *Bethune's* affairs having in the meantime gone altogether to ruin, the executors of *Innes* brought an action against *Brown* in the King's Bench, to recover back the £500, or damages for not conveying the land, and on the 18th of September, 1837, the cause was tried and a verdict rendered for the defendant upon the issues of non-assumpsit, and set-off pleaded. A new trial was moved for, and a rule to shew cause obtained, which after argument was discharged. In January, 1842, *Brown* died, having by his will devised all his property to his wife, *Margaret Brown*, and made her sole executrix. Before his death, (December, 1841,) the respondents had filed their bill against *Brown*, for specific performance of his alleged agreement to convey the estate to Dr. *Innes*, relying upon the payment to *Bethune* as being payment to *Brown* through his agent, and praying that he might be compelled to make a title to *Eliza Innes*, the sole devisee of *Robert Innes*, the alleged purchaser, to which bill *Brown* appeared, but had not answered before he died. The suit has been revived against his executrix and sole devisee, the appellant, and upon her answers and evidence taken in the cause, his honour the Vice-Chancellor, on the 8th of February, 1843, decreed a conveyance as prayed, and directed that the appellant should pay to the executors of *Innes*, from the assets of *Brown's* estate, the sum advanced by them to pay off *Walton's* mortgage.

This decree is appealed from.

I have given a mere outline of the leading facts, not

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stating various attendant circumstances on which the parties respectively have relied for sustaining or repelling the claim to the relief prayed. His honour the Vice-Chancellor made his decree upon the grounds, that the contract of sale by *Brown* to *Innes* was duly proved to have been entered into by *Brown*, through Mr. *Bethune* as his agent, and that the £500 consideration money was duly paid, as set forth in the bill, that is, paid to *Bethune* for *Brown*, he being the agent of *Brown*, authorised to receive it.

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In order to support the plaintiff's case, it is necessary to establish the following points, independently of the question of fact regarding the payment of the purchase money :

First, that where a person who has contracted for the purchase of an estate dies, after paying his purchase money, (assuming the payment for the present to be proved,) and without having received a conveyance, the devisee of his real estate, under a will made after he had paid the purchase money, but which contains no specific devise of the land bargained for, may sue in equity for specific performance. Secondly, that there is proved in this case, by a note in writing sufficient under the Statute of Frauds, such a contract in substance as the plaintiffs (below) set out in their bill ; or that independently of any writing, the plaintiffs proved such a contract as they set out in their bill, and proved also such circumstances of full performance on one side, or of part performance or otherwise, as to take the case out of the Statute of Frauds. Thirdly, that where in such a case as the present, the executors have sued at law to recover back the money on account of the land not being conveyed, or to recover damages for not conveying according to the alleged agreement, and have a verdict against them on a record which would have admitted of a recovery on either ground, such proceeding at law by the executors is no bar to the devisee suing in equity on the same contract.

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With respect to the first point, I have no doubt that upon such a case as is stated in this bill, the devisee may sue in equity for a specific performance of the contract. There would be no remedy at law upon a mere agreement of this kind for the devisee, nor for the heir, (if Dr. *Innes* had died intestate,) whatever might be the case upon a covenant under seal, made by him with *Innes* and his heirs, to convey the land to him in fee. (a)

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But as regards the equitable remedy to compel a conveyance, it is no objection that the heir could not inherit, nor the devisee take any legal estate in the property. In this case, if the purchase money can be held to have been paid to *Brown*, through his agent Mr. *Ethune*, it was paid in full not only before his death, but before his will was made, so that the case would not even require the aid of the statute of 4 Wm. IV., ch. 1, respecting after-acquired property. *Innes* must then be held to have had an equitable interest which he could devise, and which would pass under the general words used in this will, as well as if the particular interest had been specified. *Brown* would be looked upon in equity as holding in trust for the devisee, and could be compelled to convey, and the same remedies in equity would lie between the devisees or heirs of the respective parties as between themselves if they were living.

Upon the second point, I am of opinion (though it has not seemed to me to be quite clear of doubt) that there is evidence in writing, sufficient to satisfy the Statute of Frauds, of a contract by *Brown* to sell to *Innes* the Wilder farm for £500 cash, which is in substance the contract set out. The proof is only to be found in the letters. *Brown's* first note to Mr. *Bethune* constitutes no contract; it is a mere authority to accept anybody's

(a) *Whitaker v. Whitaker*, 4 B. C. C. 81; *Brome v. Monck*, 10 Ves. 597, 614; *Seton v. Slade*, 7 Ves. 265; *Lingen v. Souray*, *Gilbert's R.* 91; *Savage v. Carroll*, 1 B. & B. 265; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Orme v. Broughton*, 10 Bing. 538; 1 Sug. 371; *Bac. Ab. Legacy and Devise*, B.

(a) *Owen v. Owen*, 1 B. 167; *Doe v. Taunt.* at p. 3 Mer. 441

offer to buy the estate for £500. It made Mr. *Bethune* his agent for the purpose of entering into such a contract, not with Dr. *Innes* in particular, but with any one. This was written in September, 1833. Then when Mr. *Bethune* in April following writes to Mr. *Brown*, "Dr. *Innes*, who has purchased the Wilder farm, gave me bills on Scotland, which bills have been accepted, and the moment they are paid I shall account to you for the amount, £500," and adds in his note a request "that he will make a title, and leave it with a third party, to be given up on his (*Brown's*) order;" he furnishes evidence, by a note or memorandum in writing, signed by his agent, that *Brown* has (through his agent) contracted to sell to Dr. *Innes* the Wilder farm for £500, for which a title is yet to be given; and to be given (we must infer) upon payment of the purchase money, since nothing is stipulated to the contrary. It is of no consequence that this letter is not addressed to *Innes*, but is merely a communication from the agent to his principal. When the authority of the agent is established, then a written note of what he has agreed to, signed by him, is all that the statute requires; for it is not the contract that is required to be in writing, but evidence of the contract. The terms of the contract sufficiently appear in the letters; that is, the description of the property, the price, the name of the vendee, and the interest to be conveyed. (a) This point of the case, however, is subject to a doubt arising out of the question of fact which has given rise to the whole dispute. Did Mr. *Bethune* assume on his own account to sell to *Innes*, making the transaction expressly one of his own, or did he contract as agent for *Brown*; and does the note amount to evidence of any thing more than what the appellant insists upon, namely, that Mr. *Bethune*, relying upon *Brown's* acquiescence, had taken upon himself

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(a) *Owen v. Thomas*, 3 M. & K. 358; *Western v. Russell*, 3 Ves. & B. 167; *Dobell v. Hutchinson*, 3 N. & M. 260; *Allen v. Bennett*, 3 Taunt. at p. 172; *Walford v. Beazeley*, 3 Atk. 508; *Kennedy v. Lee*, 3 Mer. 441; 1 Sug. 168-9.

1846. to deal with *Innes* for the sale as if the land were his own, not contracting on behalf of *Brown*? It may be said that the letter of *Bethune* to *Brown* (April, 1884) contains no statement inconsistent with that; and in truth it does not; but we find *Brown* agreeing to the sale at that specific price, both before and after the bargain was concluded, and we cannot hold otherwise than that *Innes* would be at liberty to look to him for the fulfilment of the contract, though he might also have chosen to deal with *Bethune* as a principal in such a manner as to have a clear recourse upon him. And indeed *Brown's* letter to *Innes*, written in April, expressly adopts the contract. "I cannot make a title (he says) to the lot you purchased until *I get the pay*." This is equivalent to an engagement to make a title when he does get his pay; and it is a promise made directly from himself to *Innes*. There being then a sufficient note in writing of his agreement to convey the Wilder farm to *Innes* when he should receive the £500, it is not necessary to discuss the point, whether the circumstances of Dr. *Innes* going into possession as he did, and being allowed to hold it, making considerable improvements, (relying, as it is said, on his purchase,) could take the case out of the statute, if there had been no sufficient writing. Nor need we consider the effect of payment of the purchase money, which indeed could not be relied upon without anticipating the discussion upon the main question in the case, that is, whether the purchase money can be considered as having been paid to *Brown* or not. The appellant's admissions of a parol contract in her answer, so far as they go, would not now, I conceive, be sufficient to establish the case in the absence of a writing, because she expressly sets up the statute as a bar.

Judgment

Upon the third point, which is, whether the proceedings at law taken by Dr. *Innes's* executors form any impediment to the devisees suing in equity, I trust we are right in assuming that they do not create a difficulty;

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but I do not by any means accede to the arguments used on the part of the respondents on this point in the case to their full extent. If *Brown* and *Innes* were still both living, and *Innes* had sued *Brown* in such an action as is set out in the record, which is in evidence in this case, his recovery of damages would of course have prevented his suing afterwards in equity to compel a conveyance; so I think would his failing to recover, by the jury giving a verdict against him upon such issues as involved proof of the contract, and led to a trial upon the merits. It seemed to be assumed that final judgment must be entered; that a mere verdict is of no consequence, but that the civil action must be conducted to such a termination as places upon record a judgment of a competent tribunal upon the merits. The language of the Lord Chancellor, in the case cited, (a) is certainly to that effect, and is very emphatic, but it must be considered in reference to the particular case, and can hardly have been intended to lay it down as a principle, that where a party has received an injury for which he may claim damages at law to the extent of a full compensation, or may sue in equity for a mere specific remedy, he may first drag the opposite party into a court of law, and at any time before or after verdict, so long as there is no judgment entered of record, may at pleasure change his jurisdiction, abandon his action, and commence a suit in equity. If both parties were living, I conceive that Dr. *Innes* could not have abandoned his civil action after verdict against him, and filed a bill, without shewing some ground for the double proceeding that is not shewn on the pleadings before us. If he could not so proceed against *Brown* himself, he could no more proceed against his heir or devisees. Then as to the change of parties on the other side, it has this effect, no doubt, that by Dr. *Innes's* death his interests as to the realty and personalty are in different hands. His executors, in the action which they did in fact bring, could, I have no doubt, have recovered back the purchase money

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(a) *Behrens v. Sleeking*, 2 Mylne & Craig, 602.

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Brown
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which *Innes* had paid; or could have recovered what a jury might think it reasonable to give for breach of the agreement to convey, if, in the opinion of the court and jury, they had proved such a case as they declared upon. The contract was broken in the time of the testator, if broken at all; he therefore had a full and perfect right to recover all the damages occasioned by the breach of that contract. Neither his heir nor devisee could sue at law upon the breach of such an agreement; their remedy would be in equity only. (a) If the executor had recovered in the action at law, it would have prevented the devisee suing afterwards in equity, for clearly the vendor or his representative could not be compelled to make a double satisfaction for the breach of the one agreement. The remedy of the devisee of *Dr. Innes* would, in that case, as I consider, be against his executors, to compel them by a suit in equity to lay out the sum which they might have recovered in the purchase of other real estate for the devisee. I do not mean that the language of the courts has been always decisive and consistent in favour of the executor recovering upon such an agreement a full recompense for the breach of covenant as his testator could have done, but I take that to be the effect of the decisions, and I cannot reconcile the language of the judges in the case of *Orme v. Broughton*, with the supposition that they took any other view of the law. Then, if a recovery at law by the executors would have prevented the devisee from suing in equity to compel a conveyance, their failure to recover would, in my opinion, have the same effect if the pleadings in the action at law opened to the jury the whole case upon its merits, so that the plaintiffs must have recovered if they had proved the contract alleged, and if the result, so far as the case had gone, was adverse to their recovering on the merits; otherwise the same object of litigation might be pursued in two tribunals, both equally competent to charge the defendant, though not both

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(a) 1 Sug. 371.

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competent to give the same remedy to the same plaintiffs. I do not understand that the question depends upon that, nor upon the fact of the party succeeding or failing. If it does, there would seem to be no meaning in all that is said about parties not being allowed to change their jurisdiction after a tribunal has been resorted to which can entertain the case, though not precisely in the same shape. No doubt, so far as the principle rests upon the election of remedies being binding, it is to be considered that it was the executors here that proceeded at law, and that it is *their* election which is attempted to be made conclusive upon the devisee, who stands on a different interest. Still the question remains, whether the party can be allowed to be prejudiced by the circumstance of *Innes's* death having placed his real and personal estates and interests in different hands. So far as his estate is concerned, it would seem reasonable to hold that it should not be in the power of those representing him in different respects to pursue separate remedies for the same injury, any more than he could have done it while living. If a court of equity would in such a case, at the instance of the devisee, restrain the executors from proceeding at law for damages, in order that the estate might be obtained in equity, in a suit for specific performance, that would seem to be the proper course. But it is material to consider, that we had not in this province at that time any court of equity to resort to, and that the devisee was on that account perfectly helpless. Whatever effect therefore it might seem proper to give to the fact of the executors having sued at law under other circumstances, it would seem very unreasonable and unjust to hold the devisee precluded by the abortive attempt of the executors to recover damages, while she had no tribunal open to her in which she could sue, though if the executors had recovered a recompense in damages, that must, as I suppose, have put an end to all further proceedings against *Brown's* estate on the agreement.

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There are other considerations connected with this branch of the case which I will not now dwell upon, because our ultimate decision will not turn upon them. If it did, indeed, I should feel it necessary to pursue the subject much further, for I have not arrived at a clear conclusion upon it. It may be that it ought to have been shewn in this suit, that the failure to recover at law was not upon some ground arising from defects in the system of proceeding at law, or it may be that the executors failing at law upon grounds which would be equally conclusive in equity, should be no impediment whatever to the devisee afterwards pursuing her remedy in equity, and it would at any rate be right to hold this until we can see the contrary very clearly established upon authority.

Judgment.

At present I assume that the agreement is legally proved as charged in the bill, that is, that *Brown* engaged to convey the land on being paid £500 in cash, and the devisee has this remedy upon it, and that she is not precluded from pursuing it by the attempt which the executors of *Dr. Innes* have made, and failed in, to recover damages at law; and as the case is one of considerable hardship, it is more satisfactory to be able thus to dispose of it on a view of its substantial merits.

All that remains to be determined then, is, whether *Mr. Brown* can be properly held to have broken his contract, or rather, whether the devisee of *Dr. Innes* is now in such a position that she can call on *Brown's* representative to perform it.

We have considered the evidence as carefully as we are able, in all its bearings, and are compelled to say, that, in our opinion, *Brown* is not chargeable with a breach of his contract, for that the condition has not been performed on which he undertook to convey; he has not been paid the £500.

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The devisee (of *Innes*) contends that Mr. *Bethune* was really the agent of *Brown* for receiving the money, as well as for finding a purchaser; that upon the supposition that he was so, Dr. *Innes* paid him by placing bills in his hands which produced the amount; that although *Brown* named £500 as his cash price, and though the bills at three or four months, not yet presented, were not cash, yet they were accepted by *Brown's* agent, and with the knowledge of *Brown*, as a compliance with the terms which *Brown* had exacted, provided they should be paid at maturity; that is, the delay was not objected to. She contends further, that the understanding and expectation of *Brown* was that the bills were to be negotiated through Mr. *Bethune*, and the money pass into his hands; that therefore when the money did pass into his hands, it was in fact and legal effect a payment to *Brown*, and entitled Dr. *Innes* to call for his deed.

She insists further, that this view of the case is strengthened by the facts, that *Bethune* and *Brown* had up to that time and at that time large unsettled transactions together, and connexions in business of so intimate a nature, that payment to one, on account of the other, of an amount like that in question, upon similar transactions, might be implied from the accounts given in evidence to have been a matter of ordinary occurrence, which neither would think of objecting to; that the nature of their dealings in regard to mutual accommodation in banking paper, would naturally account for their business being upon such a footing, that the actual state of their accounts at that time did either in fact warrant Mr. *Bethune* in taking credit to himself for the proceeds of these bills on *Brown's* account, or that both parties might well have supposed it did, and might therefore, for the time at least, without impropriety on the one-side, or dissatisfaction on the other, have been content to have the matter rest on that footing; that when the bills were given, Mr. *Bethune* was looked upon by every one as perfectly solvent, and *Brown's* confidence in him was

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unlimited; that there is therefore in all the circumstances no reason to doubt, but on the contrary good reason to infer, that *Brown* did understand and intend when the bills were taken, that *Mr. Bethune* should negotiate them and receive the proceeds, and should credit the sum to him in account, and that as soon as it should be known that the bills thus negotiated were actually paid, it should be considered that the £500 were paid within the condition of the bargain which *Mr. Bethune* was authorised to make, so that *Innes* might then call for his deed.

There can be no doubt, if this be so, the consequence would follow, that the money being paid upon the bills in good faith to *Mr. Bethune*, before his insolvency was known, or paid to any one whom he had transferred them for value in the way of business, would be a good payment to *Brown*, and would entitle *Dr. Innes* to demand a conveyance.

Judgment.

Mr. Bethune's evidence in his depositions goes far to support such a case, but not to the full extent, for even in these depositions he admits that *Dr. Innes* often stated that he looked to him (*Bethune*) for the farm or the money, and would have nothing to do with *Mr. Brown*; and it is but just to the appellant to consider, that what *Mr. Bethune* states in his evidence, taken upon commission after he had left this province, seems wholly at variance, not only with the testimony of the two Messrs. *Owston*, but with the written statements of the transaction made by *Mr. Bethune* himself, in his note written at the time, and written too for the purpose of governing the conduct of both *Brown* and *Innes*, in their communications with each other upon this very matter. It seems inconsistent also with the declarations and conduct of *Dr. Innes* himself.

It is to be borne in mind, that the bills being transmitted from Montreal on the 10th of October, and pay-

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able at three and four months respectively after sight, it was not known (as I suppose) at Cobourg, while the communications were going on, in April, 1834, whether they had been actually paid or not, though it seems that it was known they were accepted.

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Mr. *Bethune's* affairs, no doubt, were in an embarrassed and confused state in April, 1834, while these communications about the title were passing; but whether that was generally known in Cobourg or not, at that moment, and whether it was known to *Brown* in particular, does not certainly appear. I infer from the statements in the evidence, that it was probably known to *Brown* in April, 1834, that Mr. *Bethune's* affairs were embarrassed, and that their mutual transactions had ceased before that time.

Bearing these things in mind, we must now look at the appellant's case.

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Brown's written instructions to *Bethune* is, to sell the farm for £500 cash. What that means there can be no doubt, and we can admit no parol evidence of a different agreement; but it is not contended that the meaning was, that the bargain was to be instantly consummated by payment of the money, but only that when it was to be consummated, (which *Brown* would allow a reasonable time for,) it should be a cash transaction. *Brown* admitted that he was willing to wait till Dr. *Innes* could procure his money, by negotiating his bills through Mr. *Bethune*, or in any other manner, but that what he stipulated for, and never departed from, was, that he would give no deed till he actually got the money; that he had merely authorised Mr. *Bethune* to close with any offer of cash, at £500.

The evidence seems irresistibly to lead to the conviction, that *Innes* on his part was resolved to deal exclusively with Mr. *Bethune*, and not to connect himself in

1846. any measure or degree with *Brown*. He would pay *Bethune* the money, and look to him for the deed, and to no one else, satisfied that he could procure it for him, and that if he could not, he was honourable and responsible; and that he would therefore be ultimately safe in his hands. One cannot peruse the evidence without being satisfied that he would not on any account have placed his bills in *Brown's* hands, though he knew (as I suppose) in September, 1838, that the land was *Brown's*, and that the deed must come from him.

Mr. *Bethune* on his part, seems not to have hesitated to close the bargain with Dr. *Innes*, as if the land were his own and not *Brown's*; I do not mean that he misrepresented the state of the title, or that *Innes* did not know it, but that he was willing to deal on that footing; to sell the land as he would have sold a lot of his own, making himself responsible for the title, and to account to *Brown* (as no doubt he meant to do) for the proceeds. Accordingly, though *Brown* wanted cash, as he says, and therefore those sterling bills might have answered to him, as well as to Mr. *Bethune*, the valuable purpose of supporting credit by making a conditional remittance, and though he lived nearer to Dr. *Innes*, it seems, than Mr. *Bethune* did, yet the bills were drawn not in *Brown's* favour, but in Mr. *Bethune's*; they did not pass into *Brown's* hands, but were immediately sent by Mr. *Bethune* to his correspondent in Montreal, with directions to credit them to his account. "These bills," (he says to his correspondent and creditor, for he was then largely indebted to *Bradbury*) "are taken in payment of land. The gentleman came well recommended. You will of course forward them," &c.

This is just what he would write of a transaction of his own, and if it had been true, as stated in the bill, but not proved, that at that time the balance in account with *Brown* was much in *Bethune's* favour; or if *Bethune*

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believed that, which we must suppose from his evidence he did, one can well understand that he would make just such a communication, if, having *Brown's* permission to sell the farm for £500, he resolved to act as if the sale were on his own account, holding himself accountable, as of course he would be, to *Brown*, for the proceeds. All this would have been well enough, and would have led to no loss in any quarter, if *Bethune* had remained solvent; but the money being lost in his hands, from his inability to replace it after he had diverted it to the payment of his own debt to *Bradbury*, it becomes due, in justice to the other party, to scan the nature of the transaction scrupulously; not by what *Mr. Bethune* may have intended to do, but by what *Brown* contemplated and agreed to do.

It is reasonable to suppose that *Brown* knew that *Mr. Bethune* had found a purchaser in *Dr. Innes*, and that he had received bills from him; and that he was content to wait for a few months in the expectation of receiving the money, either from *Dr. Innes* or from *Mr. Bethune*, it would not matter which, and it is not inconsistent with the appellant's account of the matter, that in the meantime he should offer no opposition to *Dr. Innes's* going into possession, upon any compromise which he could make with *Wilder* the tenant.

Judgment.

That *Dr. Innes* took possession in consequence of his intended purchase, and would not have done so but for that, and that *Mr. Brown* so understood the matter, I have no doubt; so also that *Dr. Innes* should make improvements on the place, which he would not have done but for his purchase; and that *Brown* must have thought so, it is most reasonable to infer; but it seems to me that these circumstances are of no importance either way. *Dr. Innes* felt confident that his bills would be paid, as they were; and it is plain that nothing was further from his mind, than any distrust of his money in that case finding its way to *Mr. Brown*. On the

1846. other hand, *Brown* might naturally take it for granted that Dr. *Innes* knew his own prospects of getting the money; that he well understood, that without the money he could get no title, and that he therefore acted at his own risk. *Brown* was secure as long as he held the title, and he had no motive for warning or prohibiting Dr. *Innes* from doing any thing that he was doing, or for offending his proposed purchaser by intimating any distrust.

Brown
v.
Smart.

Then in April, 1834, while, for all that appears, (though I am not sure the fact was so,) the actual payment of the bills in England might not have been known in this country, we find Dr. *Innes* pressing Mr. *Bethune* for his deed. If he did not then know that the bills were paid, he was pressing for his title prematurely; and his anxiety probably arose from rumours of Mr. *Bethune's* difficulties, and upon this occasion it is that Mr. *Bethune*, Judgment. for the first time, for all that appears, (except as he states in his own depositions,) informs Mr. *Brown* how the transaction really stood, in the hope of inducing *Brown* to make the title without receiving the money.

His letter bears strong marks of its being his first communication to *Brown* of his transaction with *Innes* about the bills; he impliedly admits in it that he cannot insist on a title being made, because the money was not paid, but he suggests that a deed may be made and deposited with a third party, subject to *Brown's* order, which could only be to quiet Dr. *Innes's* anxiety for the time. He does not then tell *Brown* that he had made use of the bills as a remittance; he does not pretend that *Brown* had authorised him to receive the money on his account, but says he can draw for it (to pay over to *Brown*) as soon as he hears that the bills are paid. He does not pretend that he had given *Brown* credit for the money in the accounts between them; or that he meant to do so, or was at liberty to do so; but, on the contrary, says expressly in his note, "*this transaction is entirely our*

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of our other business," thereby holding out to him the certain prospect, if the bills should be paid, of the actual £500 going into *Brown's* hands, just as much as if *Dr. Innes* had sent his bills through any other channel.

1846.

Brown
v.
Smart.

All this is consistent with the appellant's account of the transactions, though very inconsistent with Mr. *Bethune's* statement made long afterwards, when he had failed in business, and when he must have been aware, that the effect of his having converted the bills to his own purposes must have been to throw the loss of the whole money upon *Dr. Innes*, who had trusted him so implicitly, and would trust no one else, unless the transaction could be so treated as to make *Brown* bound by the payment. Such a reflection must, I have no doubt, have been a very painful aggravation to Mr. *Bethune* of the misfortunes he had fallen into. That it could have induced him to state, under his oath, any thing contrary to his clear recollection of the facts, we should not allow ourselves to suppose, but it is due to justice to consider, that this note contained his statement of the facts of the transactions while they were recent; a statement, too, deliberately made in writing, for the purpose of inducing *Brown* to act upon it; and what gives it great additional weight, and was justly relied upon in the argument as having that effect, is that *Dr. Innes*, by taking this note himself to *Brown*, which he had read and found no fault with, impliedly confirmed *Bethune's* account of the transaction. If he then conceived from any thing Mr. *Bethune* had formerly stated to him, that when the bills were paid, *Brown* would be paid, whether he ever saw the money or not, why did he not say that there could be no occasion to wait till Mr. *Bethune* could draw for the money upon his agent in England, for that payment to Mr. *Bethune's* agent there would be a compliance with his contract, whatever might become afterwards of the money?

Judgment.

If the letter he was carrying from *Bethune* to *Brown*,

1846. should not naturally have led to this remonstrance on his part, *Brown's* answer to his own note surely must, for *Brown* there assured him in plain and positive terms, that there should be no deed made till he got the money; and he gave as a reason why he had always insisted upon this, that he had a mortgage on the land to pay off, and must have the money to do it with.

Brown
v.
Smart.

Judgment. Now if it were clearly shewn that *Innes* did in truth only deal with *Bethune* as *Brown's* agent, that *Bethune* was authorised by *Brown* not merely to take the offer but to take the money, (which I do not take to be the obvious construction of his note of April, 1833,) then of course *Innes's* situation could not be prejudiced by any misapplication which *Bethune* might make of the money after receiving it, so long as *Innes* himself acted in perfect good faith, as I have no doubt he did; but the difficulty of the case consists in this, that *Brown* seems to have done all a man could do to preserve his land till he should actually get his money; that the written documents shewed he acted in that spirit; that Mr. *Bethune's* own written account of it, and Dr. *Innes's* conduct and admissions, confirm it, and produce a preponderance of evidence strongly in favour of the appellant's case, even without the aid of the very circumstantial and conclusive testimony of the witness *Owston*, whose evidence is not in any manner impeached or shaken.

To these circumstances it is to be added, that in the accounts rendered by Mr. *Bethune* during this period, and extending to the close of his transactions with *Brown*, he made no mention of these bills; that it now turns out that in 1835, upon a settlement of accounts with *Brown*, he discovered himself to be more than £2000 in his debt; that at the time of the bargain being made he was in his debt a small sum, and that it is not proved, as is alleged in the bill, that he applied the £500 in making good any liabilities which he had assumed for *Brown*; but clearly otherwise. And it is further

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material to remember, that the bills which Dr. *Innes* had placed in *Bethune's* hands were not for the amount of the purchase money only, but were for £500 sterling; which would produce, with premium on exchange, I suppose, nearly £100 more; and that Mr. *Bethune* was to place the overplus to Dr. *Innes's* credit in the bank for which he was agent. The whole case seems to lead to the conviction, that Dr. *Innes* confined his transaction to Mr. *Bethune* expressly and designedly, and made him his own agent to receive his money, and pay it to *Brown*, and to procure his deed, instead of dealing with him as *Brown's* agent, and paying him the £500 sterling in that capacity. If *Bethune* had continued solvent, and *Brown* had become bankrupt, and his real estate passed into the hands of assignees; and if Dr. *Innes*, having negotiated his bills through some other channel, had paid his £500 sterling in cash into *Bethune's* hands, and it had been actually consumed there by fire, he would have thought it, I doubt not, most strange and unreasonable, that he should be told that his money was virtually in *Brown's* hands, and that he could look only to him. Judgment.

1846.

Brown
v.
Smart.

The evidence seems to place the case on grounds to which Lord *Ellenborough's* language in *Parnter v. Gaitskill*, (a) strongly applies: "The money appears to have been paid by the plaintiff upon his own confidence in the agent employed, and having trusted him, without any fault in the defendant to induce that confidence, he must stand to the loss, and is not entitled to recover it against the defendant."

If this be the correct view to take of the transaction, it must as decidedly prevent a court of equity from decreeing a specific performance of the contract, or rather from decreeing a conveyance, as it should prevent the party from receiving damages at law for an alleged breach of contract. It is with much reluctance that we come to the conclusion upon the case which I have

(a) 13 E. R. 438.

1846.

Brown
v
Smart.

expressed, because, although looking merely at the amount, it would be a great hardship that the one estate should lose the land by being compelled to convey it without an equivalent, as that the other should lose the money with which the land was intended to be purchased, yet there is reason to fear that the loss would prove much more heavily, if not distressingly, upon the one party than it would upon the other, and because the loss has occurred partly through the misfortunes, and partly through the irregularity, of one in whom *Brown* had long been reposing, as it appears, especial confidence, and who was much better known to him than to *Dr. James*. And again, when we see the nature of the accounts between these parties, the multitude of their transactions respecting lands, the freedom with which large credits were passed by *Bethune* to *Brown* upon similar transactions, and when we consider the estimation in which *Mr. Bethune* is admitted to have stood, both in regard to character and means, we cannot feel sure, if *Mr. Bethune* had for any purpose desired to let the £500, when paid, pass into their current account, that *Brown* would at any time have objected; and we cannot, after all, be certain that this was not the understanding between them in regard to this particular transaction. If it were so, that would put an end to the question; but looking only at what is proved in the case before us, we are bound to say, that the evidence shows almost conclusively, that the transaction was one of a different kind; and it is a principle in equity, that unless the case is free from difficulty and doubt, specific performance should not be decreed, but the parties should be left to such remedies as the law will give them.

Judgment:

We have thought of the propriety of directing an issue in order to take the opinion of a jury upon the question of payment, but it is in so great a measure a question of law, arising upon the conduct and statements of parties evidenced by writing, and not capable, for any thing that is suggested, of having additional light thrown upon it

by further proofs in the power of either party, that we should hesitate about the propriety of such a course, since it could not be satisfactory to adopt the conclusion of a jury at variance with the written statements, which, so far as they go, should be their guide as well as ours. And there is besides the fact well known to ourselves as well as to the parties, that the opinion of a jury has already more than once been given upon the very question upon which the case now turns, namely, whether Mr. *Bethune* received the money as the agent of *Innes* or of *Brown*?

1846.

Brown
v.
Smart.

It was noticed, indeed, upon the argument of this appeal, that in consequence of the discussions to which the verdicts alluded to have given rise in the Court of King's Bench, the case does not come as a new one before us, when we are called upon to review the decision of his honour the Vice-Chancellor. We wish it had been otherwise, for it is very natural that one of the parties should consider it a disadvantage. The circumstance, however, which occasions it, is one over which we have no control. When the legislature thought fit to make the common law judges members of a court for hearing appeal cases which had been decided in Chancery, they made it their duty to pronounce the best judgment they can form upon whatever cases the parties may bring before them.

Judgment.

The changes in the political arrangements of the government, which have since removed to a great distance almost all those members of the court of appeals with whom it was intended we should be associated, must have the effect, while things remain on this footing, of placing us now and then in a situation where we must decide upon questions which in some other shape have been already before us, and perhaps between the same parties, and upon the same facts. If this previous judicial acquaintance with a case be a disadvantage, the party in whose favour his honour the Vice-Chancellor has

1846. decided, may be at least assured, that if we could have found ourselves warranted by the course of equity proceedings, in disposing of the case in a manner more favourable to her than the common law had seemed to us to allow, we have had every inclination to give her the full benefit of the difference. If we have failed, as is very possible, in arriving at the correct conclusion, it is some satisfaction to reflect that there is still a course open, though unfortunately an expensive one, for obtaining in a higher court the judgment of minds far more experienced, and not possessed with any previous opinions upon the facts to be submitted to them.

Judgment. The result of our judgment is, that the decree is reversed, and the bill dismissed with costs.

[*Before the Hon. the Chief Justice, the Hon. J. B. Macaulay, Ex. C., the Hon. H. J. Boulton, Ex. C., and the Hon. Mr. Justice McLean.*]

ON AN APPEAL FROM A DECREE OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

SIMPSON V. SMYTH.

Feb. 12 & 27, 1847. The Court of Chancery, under the 11th section of the Chancery Act, may under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.

After the decision as reported ante page 1, the cause was again brought on for argument.

Mr. *Blake* appeared as counsel for the appellants.

Mr. *Esten* for the respondents; their arguments being confined to the construction to be placed upon the eleventh section of the Chancery Act, 7 Wm. IV., ch. 2.

ROBINSON, C. J.—I retain in this case the opinion

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which I expressed after the last argument. I still have no doubt that the legislature did intend by the eleventh clause of the Chancery Act, to give to the court which they were about creating an unlimited authority to grant or withhold redemption of a mortgage, as well as authority to impose particular conditions for the benefit of the mortgagee, in regard to compensation for improvements, when they should allow redemption; this discretionary authority to depart from the rules of equity in England being limited, however, to those cases in which the estate of the mortgagee had become absolute before the passing of the act, by reason of the failure of the mortgagor to perform the conditions. I think also, that it is by no means unreasonable to suppose (but quite otherwise) that the legislature would think it proper after the most mature deliberation to grant this extensive discretion to the new court.

1846.

*Stumpson
v.
Myth.*

They were about suddenly to create an equitable jurisdiction in a country in which the law of England, uncontrolled by and unmixed with equity, had been administered for nearly fifty years; and where mortgages had been freely given and taken throughout all that period, both parties being left, in such cases, as in all others, to the legal consequences of their contracts. It might have been an opinion among lawyers, looking speculatively at the subject, that there was an equity of redemption nevertheless slumbering, though the mortgagor, as the law stood, had no means of enforcing it, and the mortgagee no means of guarding against it by foreclosing.

The legislature, when they were about creating a court of equity in 1837, if they desired that it should have the power of granting relief in respect to past transactions no longer open, and when nothing remained to be executed on either side, must have been sensible that by thus throwing a new ingredient into such contracts, they were creating a state of things very much out of the ordinary course.

1846.

Simpson
v.
Smyth.

Judgment.

They could not collectively foresee, nor, I think, could the most experienced mind among them have foreseen, the questions and difficulties that might present themselves, if the proposed court of equity were to have power to deal with such cases as I have described, and were expected to apply to them the rules and principles of English courts of equity, without making allowance for such a state of things as does not exist in England; but I think it might be expected to occur to the least experienced mind in the legislature, upon slight reflection, that the court would soon be urged to allow redemption, in cases when in England redemption would be out of the question on account of the lapse of time; and that it would on the other hand be not unfrequently perhaps pressed to refuse redemption where in England it would undoubtedly be allowed, the respective parties resting their claims on the peculiar equitable considerations arising from the circumstance that there had hitherto been no court of equity. The mortgagor might say, "I come late it is true, but it is only because there was no such remedy to be had before." The mortgagee might say, "I claim to hold my estate absolutely, though I have not been twenty years in possession, because having no means for foreclosing, and having waited for years for my debt, relying on an unproductive security, I was obliged, as the mortgagor well knew, to avail myself of my legal rights, and to act as if I were in that situation, which I unquestionably would have been in, if I had had a court open in which I could have proceeded to foreclose."

I need not hesitate to say, that there might well arise cases in which the mortgagee would have justice in his favour in objecting to redemption being granted, even though there had been no bar from mere lapse of time, and though there might be no other ground on which redemption could be refused under the authority of any adjudged case in England; for in the very case before us a majority of this court have expressed the opinion

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that it would be reasonable and just to refuse redemption, if the court had the power to do so. And I could easily suppose cases in which the grounds in favour of the mortgagee might be even stronger.

1846.

Simpson
v.
Smyth.

It might have occurred to the legislature, and possibly it did, that new cases have in very many instances given rise to new precedents; that it is the essential attribute of courts of equity never to be compelled to do injustice; and that whenever they find they cannot interpose without inflicting wrong, they will leave parties to abide by the consequences of their legal rights. And they may not have taken it for granted, that if they should make no special provision on the subject, the new court of equity would not have an inherent discretion and authority to depart from English rules in such cases, whenever they should see clearly that their application must produce injustice, on account of past circumstances, and a state of things peculiar to this country, and which could not have received consideration in English courts of equity. If, in truth, they had entertained that impression, either certainly, or with some degree of doubt, yet they could not be sure that the judge who should preside in the court would feel his ground clear in that respect, and they might be well satisfied, that if he should assume a discretion to create new principles of action in his court, his right to do so would be strenuously contested. They might, therefore, naturally feel that it would be more considerate towards the proposed new court, and to those who were to be litigants in it, if they should make it clear in their statute, that they intended to invest the equitable tribunal with full power to do complete justice in the cases alluded to, unfettered by the English practice, established as that had been under widely different circumstances.

Judgment.

It might be objected by some, that this would be conferring a dangerous power and authority to act without

1846. settled principles ; but others might think that evil less
 with the security of a double appeal, than the evil of
 leaving the court under the certain necessity of doing
 injustice, from the want of power to do what they might
 see and know to be right ; from an inability, in short,
 to meet an unusual exigency.

Simpson
 v.
 Smyth.

All that we need know is, that the legislature *did* resolve to express in the statute the manner in which they expected and intended the new court to act, in this particular department of its jurisdiction ; and to this end they framed the clause now in question.

They recite in it, that the absence, up to that time, of any court capable of decreeing a foreclosure, might, in regard to past transactions, have given rise to circumstances affording ground for peculiar equitable considerations ; and which would, under the rigid application of English rules, be productive of injustice to one party or the other.

Judgment.

Now, as the legislature thus plainly admitted, what any one conversant with the subject could not fail to see, that there might be equitable reasons for departing on either side from the English practice in the matter of mortgages, it would have been a very one-sided equity on their part, if they had, after all, resolved to leave the court at liberty to do complete justice to one of the parties, according to whatever might be its sense of justice, and yet to confine it within such limits in regard to the other party, as might disable it from doing justice to him according to the same full measure.

It is plain, I think, that the legislature ought to have had no such intention ; that if they resolved on the one side to give to the mortgagor the privilege of going after the twenty years and asking for redemption, they should, on the other side, under the influence of the *same* sense of justice, hold him subject to the equity of having

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redemption withheld from him, though he might sue for it within the period generally allowed for it in England, provided the facts which had occurred during the time when no court of equity was open should lead to that as the most just result. If they had allowed a clear equity, created by our past peculiar state of the law, to operate in favour of the mortgagor, by enlarging his right of redemption, they would have acted unreasonably in not allowing as clear an equity to operate against him in abridging his right. In the latter case, it would not be putting the matter correctly to say (as was suggested in the argument) that they would thus by legislation be depriving the mortgagor of his estate; they would only be authorising the court, when they saw that to be just, to forbear *giving his estate back to him*, after he had lost it by his own wilful or negligent default, and when they should see plainly that by reason of some peculiar circumstances, it could not be restored without doing an injury to others far greater in amount than any benefit which he was fairly entitled to claim.

1846.

Simpson
v.
Smyth.

Judgment.

I do not feel the slightest doubt, that the legislature did intend thus to make the Chancellor the equal distributor of justice between both parties.

Then, have they failed (as it is argued they have) in giving effect to this just intention? To determine the point we have to examine the eleventh clause, and indeed the whole act, if there be any other part of it which can help us to see what was intended. And after all that has been said, when I look again at the recital by which the enactment in the eleventh clause is prefaced, and at the enactment itself, I must say that I feel the full force of the maxim referred to by the court, in *Jeffrey's case*, (a) "*perspicue vera non sunt probanda*;" and I feel also the force of the commentary upon that maxim, because (as the court says) "he who endeavours to prove them, *obscuras them*."

(a) 5 Co. 67.

1846.

Simpson
v.
Smyth.

It is, however, I must admit, a common case, that where we feel ourselves no degree of doubt upon any point that has been started, we can hardly prevail upon ourselves to examine with due attention the reasonings by which our conclusions may be opposed. I would very much desire to avoid any such impatience in the present case, because the question that is raised is really an important one, and may apply in some shape in a great number of cases. Still I must confess myself unable to reason clearly upon the grounds of doubt, because I really have failed to apprehend them, and to discover in what part of the clause a question can find entrance.

Judgment.

It was ingeniously endeavoured, on the last arguments, to raise doubts upon the construction, by dividing the clause into two branches, as it were, and showing how its language could or could not be made to support separately two modes of application, one applying directly to the mortgagee only, and the other to the mortgagor. This method may be effectual in this case, as in many others, for creating a difficulty; but if, when we read the whole clause together, any apparent difficulty is removed, then the ingenuity of raising a doubt by reading it separately, must appear to have been exerted in vain. For effecting some useful purpose, a material substance may be required to be framed in a certain shape, and if, when that is done, the desired result is obtained, it is no argument against the efficiency of the instrument that it cannot be separated into two parts, each of which shall be capable of standing alone and of accomplishing one half of what is expected from the whole. It is sufficient if when taken and used together it answers the intended purpose. When we see a mill, for instance, complete in all its parts, we have no doubt what purpose it is intended to accomplish and is capable of accomplishing as a whole; and we could not allow ourselves to be in doubt on either point, because it might be demonstrated to us that it could not be so divided into two parts, as that each should be capable of doing the work or part of

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the work of the whole. So it is of the effect to be derived from written language; whether it be a will, a deed, or an act of parliament we have to construe, our obvious course is to take it as it stands, and looking at it as a whole, to satisfy ourselves of its meaning; and when we have discovered this, we are bound to give to it its due effect.

1846.

Stimpson
v.
Smyth.

Now, when the the legislature has thought fit to declare in express words that "the Vice-Chancellor shall have power and authority in all cases of mortgage, when before the passing of this act the estate has become absolute in law by failure in performing the condition, to make such order and decree *in respect to foreclosure or redemption*, and with regard to compensation for improvements, as may appear to him just and reasonable; they seem to me, by those words alone, to relieve the court from any necessity of doing injustice to the one party or the other, by a servile adherence to English decisions made under different circumstances; but still more when they have not stopped there, but have proceeded to give authority to the court "to make such order and decree generally with respect to the *rights and claims* of the mortgagor and mortgagee, and their respective heirs, &c., as may appear just and reasonable under all the circumstances of the case," I cannot understand how a doubt can be entertained that the court has a perfect control over the whole subject, and may deal with the right of redemption in all such cases as they may think just.

Judgment.

It has been urged, that when the legislature in the preamble speak of the "*right to redeem*," they admit it to be a right, and that it is inconsistent with such admission to suppose that they intended that the court might refuse to allow that, which they have acknowledged in terms to be a right; that they can therefore only be supposed to have meant, that although the right to redeem must be conceded here wherever it would be conceded in

1846.

Simpson
v.
Smyth.

Judgment.

England; yet that the case may be treated otherwise than according to English practice, *so far as regards compensation for improvements*; but I think such a construction is founded on this error, that it takes the allusion to "the right to redeem" as connected with each particular case that may be pending here in our court, and as involving an admission *a priori* of the right to redeem in such particular case; whereas I take the reasonable understanding of the words to be, that the legislature was merely then alluding to the "right to redeem" as a general principle of equity known to that system of equity which they were about to introduce, and which "right to redeem," speaking of it merely as an abstract right in cases of mortgage under the law of England, might, as the legislature declares, upon a strict application of the rules established in England, be attended with injustice, if enforced in all cases within twenty years; on which account they resolved, that in this country (so far only as respects mortgages under which the estate had become absolute before the court was created) the *right to redeem* on the one hand, and the compensation to be granted for improvements on the other, in case redemption should be allowed, should be left to depend upon the circumstances of each case, and might be granted or withheld as the court should think just and reasonable. I can put no other construction on the clause; the enacting part of it is certainly so plain and comprehensive, that if it stood alone it would not be possible to raise a doubt upon it; and as to the preamble, the legislature, having naturally referred to the circumstance, that up to that time mortgagees had had no means of foreclosing, as affording ground for equitable considerations in their favour, to be urged against what otherwise might have been advanced as a plain right of the mortgagor, admit, that "in consequence of the want of these remedies the *rights* of the parties may be found to be attended with peculiar equitable considerations as well in regard to compensation for improvements, as in respect to the right to redeem." Now, if to the last word

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"redeem" the words "*at all*" had been added, there could seem to be no escape from the conclusion that they meant the court to have a control over *the right to redeem*, as well as over the conditions upon which redemption should be granted; and yet to my mind, the only real effect of concluding with those two words, would be to give an inelegant redundancy in a sentence, the meaning of which was as plain without them.

1846.

Simpson
v.
Smyth.

I do not see that the 43rd clause of the provincial statute 4 Wm. IV., ch. 1, can interfere in the slightest degree with the question, what power is given to the Court of Chancery by the 11th clause of the subsequent statute?

The legislature, by the 4 Wm. IV., were assigning a limitation to actions concerning the realty; and their attention being drawn, while following the late English acts, to the subject of mortgages, they even then perceived on this incidental view of the matter, that it would be necessary to recognise peculiar equities in this country as arising from the yet unsupplied want of an equity jurisdiction; and they took care not to do mischief by making twenty years necessarily a bar, until the mortgagor had a reasonable chance of compelling what a harsh creditor might have unreasonably refused to him. But the provision was purely negative; they forebore to shut the door.

Judgment.

The consequence, and only consequence, of what was then enacted, is that a mortgagor might come into the court which was afterwards established, and say that though his mortgage was given very long ago, yet that the 4 Wm. IV. did not bar him simply from the lapse of twenty years, because the 43rd clause had considerably extended his time.

To this the mortgagee might truly have answered, "I admit that the 4 Wm. IV. does not bar you, and I freely

1846. admit also, that no other act bars you, merely because the twenty years have run; for the later act, under which we are now before a competent tribunal, has authorised the Vice-Chancellor to allow you to redeem, if he finds it to be just that you should, or to refuse it if he thinks it would be unjust, taking into his consideration the conduct of parties, the changes in the title or condition of the property, and all the facts of the case, without being bound by the mere circumstance of lapse of time to decide one way or the other," and this I consider to be the evident intention and effect of the eleventh clause of the Chancery Act.

Simpson
v.
Smyth.

Judgment.

Something was said upon the last argument regarding the order which the court had pronounced, after the first argument, with respect to the costs of the appeal from the several orders of the Vice-Chancellor, made upon the demurrer for want of parties, and upon the plea which set up the sale of the equity of redemption under the judgment against *Smyth*, as a bar to the plaintiff's right to redeem. I think the question of costs must be disposed of as we then intimated it would be.

His Honour the Vice-Chancellor was of opinion, that the plea was no defence. We concur in that opinion, and therefore affirm his order with costs, to be paid by the party appealing against it. This is the usual course. With respect to the order of his Honour overruling the demurrer for want of parties, we have not made up our minds to the conclusion which his Honour came to, but the contrary, and are not prepared to affirm his judgment in that respect. We should not have dismissed the appeal except for the reason, that the defendants had waived it by submitting and putting in their answer. Dismissing it on that ground only, it would be contrary to the practice of the court to give costs; because the respondents should have urged that objection by way of petition against the appeal, and should not have gone to the argument upon it. We acted on the English rule in this respect, in the case of *Crooks v. Rhodes*.

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1 Steph. Com.

MACAULAY, Hon. J. B. Esq. C.—So far as respects the application to this case of the rules of decision which govern the Court of Chancery in England, according to the provincial statute 7 Wm. IV., ch. 2, sec. 6, my former impressions remain unaltered. I still think it properly depends upon the eleventh section of that act.

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After the last argument, I had prepared some further remarks, not evincing any change of opinion touching the construction of this clause, and confining attention to the Statute of Limitations, 4 Wm. IV., ch. 1, sections 16, 19, 35, 36, and 43; and the Chancery Act, 7 Wm. IV., ch. 2, especially the 6th and 11th sections, including the proviso to the 43rd section of the former and the preamble to the 11th section of the latter, and construing all together, guided by the rules laid down for the judicial interpretation of acts of parliament (a)

I could not place upon the language used, any other construction than I felt it my duty formerly to avow. But in reference to what I then said respecting my answers to a series of questions put to me by a committee of the Legislative Council, when the Chancery Act was pending, I have to explain that although I formerly searched in my library for the printed journals of that house, (of which I possess a number,) I could not find those for the year 1837. I have a copy of the bill as sent up from the House of Assembly, in which the 11th section relates exclusively to compensation for improvements; but the questions of the Legislative Council were, by desire of the committee, returned with my answers, and I had not seen them since; nor had I ever seen the answers of the other judges, that I am aware of; neither had I bestowed any particular attention upon the eleventh section of the act as passed, till this appeal.

Judgment.

The other day I was induced to make a renewed

(a) Dwarries on Statutes, 688, 760; Ba. Ab. Stat. I.; 1 Bl. Com. 59; 1 Steph. Com. 71; Moore's Legal Maxims, 268, 300.

1846. search for the journals of 1837, in the hope of finding the questions and answers printed therein, and am happy to say with success. Upon examining them at pages 186-7 of the journals, and in the appendix L., I found the amended clause, and the questions, together with the answers of the judges and crown officers, and it is now quite clear to me that, however expressed, it was undoubtedly the intention of the legislature, in substituting the present for the former section, to confer upon the court an unfettered discretion to grant or refuse redemption in all cases of mortgages become absolute at law before the passing of the act, viz., the 4th of March, 1837.

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v.
Smyth.

Judgment.

After perusing the eleventh section, as it originally stood, together with the questions and replies, especially the eight and ninth, and then turning to that section as amended, the intent of the substitution is, I think, apparent. The words, "*right to redeem*," in the recital to the amendment, seem to be used not so much as meaning the acknowledged right of redemption, as an interest of the mortgagor in the estate, as I had supposed, but rather the propriety of such right being recognised, or of the mortgagor being admitted to redeem at all in reference to the claims of the mortgagee to have redemption denied or refused. And the word "*right*" does not correspond in meaning with the word "*rights*" in the part of the preamble which speaks of the rights of the parties as compared with the right to redeem. Although it was formerly suggested that the term "*right to redeem*" meant "permission to redeem at all," I could not, nor can I now, reconcile such a meaning with the rest of the recital, the import of the word "*right*," or the seeming spirit of the clause on the face of it. I have been so much accustomed to associate with a right, the idea of something appertaining or belonging to a party as his right, rather than a questionable claim to be allowed or rejected at discretion, that I had always felt repelled from such a qualified construction in the

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*Simpson
v.
Bryth.*

present instance, or from regarding it as intending to impart a discretion to infringe upon the right to redeem, when such right would be acknowledged to subsist, according to the rules of decision which govern the Court of Chancery in England. We read of the rights of persons, and the rights of things, (2 Bl. 158) of legal and equitable rights, (Toul. L. Dic. "*Rights*" of the rights of entry or of possession, and the right to redeem, (Coote on mortgages, ch. 4; Story Eq. Jur. secs. 1015, 1023; Powell on Mortgages, ch. 10;) that redemption is not only a right, but more than a right. Lord Hale defines it to be an equitable right inherent in the land.—See also *Casborne v. Scarfe*, (a) *Lloyd v. Lander*. (b)

Different meanings are, no doubt, attributable to the word "*right*" according to the context; and here it appeared to me to have been used in a technical sense, but I can now perceive it was meant to be understood as if it had said, "that from the want of an equitable jurisdiction it had not been in the power of mortgagees to foreclose, and in consequence of the want of this remedy, their rights might be found to be attended with peculiar equitable considerations, as well in regard to compensation for improvements as in respect to the right or claim of mortgagors to be suffered to redeem;" or as if it had said, "not only in regard to compensation for improvements, but in respect to the propriety of granting or withholding redemption;" for the questions of the committee of the Legislative Council manifest a solicitude to favour or protect mortgagees, not mortgagors, and the amendment was seemingly introduced and adopted mainly with that view.

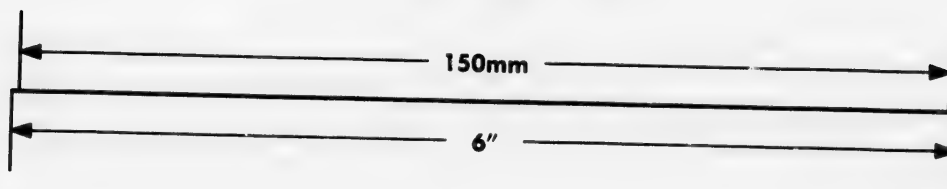
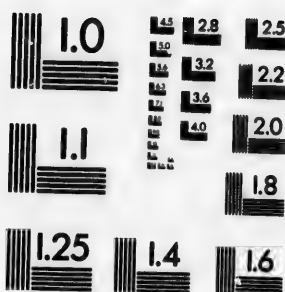
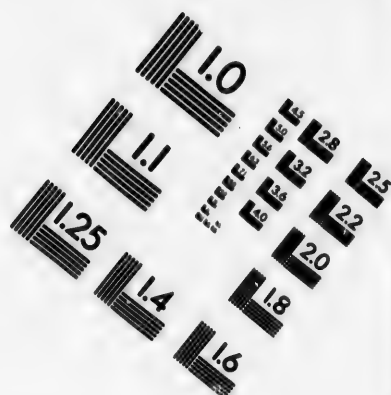
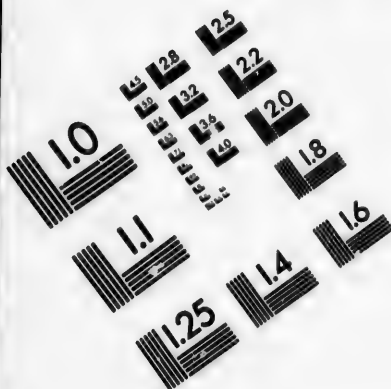
With respect to the division of the eleventh section, in my former opinion, it may be proper for me to observe, that I still think it not only a legitimate, but the best mode of getting clear views of its provisions and testing its meaning, for whenever it is to be applied

(a) 1 Atk. 605.

(b) 5 Mad. at p. 290.



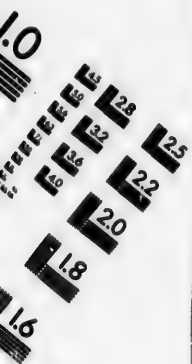
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1846. ^{Blue pen} it must be separated in the mind; and surely, however ^{Smyth.} construed and applied in any particular case, it ought to be susceptible of a reading consistent with itself and conformable to such construction and application; and I must still confess that I cannot perceive that the preamble consistently and naturally admits of any other reading than I have given it.

It of course may yet remain a question, whether the eleventh section be capable of a construction in accordance with the intention of the legislature, as manifested by the journals; and I am not prepared to say the general terms of the enacting part cannot receive such a construction, notwithstanding it may be felt to be a forced one, and very much at variance with the impression which the recital and the apparent scope and purpose are calculated to produce, and did produce on my mind.

Judgment However, without longer regard to strict reading or interpretation, I am now satisfied that the clause was intended to afford a more comprehensive discretion than I had been able to persuade myself, irrespective of the proceedings in the legislature during the passage of the bill; and consequently, so far as at liberty to notice and elicit therefrom an explanation of the grounds, inducements to, and objects of, the section in question, I can have no further difficulty in acquiescing in the views entertained by the rest of the court; and admitting the authority to exercise a discretion sufficiently wide, I formerly intimated my readiness, under all the circumstances, to concur in reversing the decree.

BOULTON, Hon. H. J., Ex. C.—This being an appeal from a court of equity, whereby the evidence as well as the equity arising thereon is submitted to our consideration, I think it most convenient in the first place to determine what facts material to the decision of the case are made out in the evidence, and then to apply myself to the equities alleged on either side to arise thereupon.

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1810, December 8. At this time I find that *Thomas Smyth* being seized in fee, by indenture of bargain and sale, in consideration of the sum of £238 11s. 3d., conveyed the premises in question to *Joseph Sewall* in fee, subject to a proviso for redemption thereof, on payment of the said sum of £238 11s. 3d., with interest, on the 3rd August, 1811. That the premises consisted of four hundred acres of wild and uncultivated land, on the river Rideau, in the township of Elmsley, and district of Johnstown, affording a site on the bank of the river for the erection of mills to be turned by water power of vast extent; but at the same time remote from any settlement, without roads, and without any trade, commerce, or other appliances of civilization to enhance their value.

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v.
Smyth.

Under all the circumstances set forth in the evidence, (exclusive of my own personal acquaintance with the state of the country at the time,) the paucity of inhabitants, the scarceness of money, and the consequent absence of almost any demand for landed property so situate, which, when deciding on facts arising upon the evidence, I cannot exclude from my mind, I am of opinion that the consideration expressed in the deed could not have been regarded at the time as manifestly inadequate to the cash value of the property; and one of the best proofs that my opinion of the then estimation of its value by those who had ample means of judging is correct, is shewn by the fact, that during the ensuing fourteen or fifteen years, the grantor, *Thomas Smyth*, was unable, even by appealing to the generosity and kindly feeling of friends, to obtain any advance upon that amount and the interest thereon.

Judgment.

1819, July. In Trinity term, the grantee, *Joseph Sewall*, recovered a judgment in the Court of King's Bench, for £467 2s. 6d., being the amount of the mortgage money and interest, and £18 18s. costs; none of which had been paid.

1846.

Simpson
v.
Smyth.

1825, August 8. By deed-poll of this date, the said *Joseph Sewall* conveyed absolutely, in consideration of the nominal sum of £5, all the said premises to *Charles Jones* in fee, and all his right to the money secured by the said indenture of mortgage; the said *Charles Jones* at the time being *Sewall's* agent, and thereby becoming in fact a trustee for the benefit of *Sewall*, who lived in the United States of America.

1825, August 27. The premises were put up to sale at public auction under a *fieri facias*, sued out upon the said judgment against the said *Thomas Smyth*, as still being regarded as the lands of *Smyth*, and the same were knocked down to *Charles Jones*, who was the highest bidder, at the sum of £105; and the sheriff of the district of Johnstown, where the lands are situate, executed a deed-poll in the usual form, conveying to Mr. *Jones*, his heirs and assigns, as far as he lawfully might, all the said lands and premises seised under the said execution, and all the right and title of him, the said sheriff, thereto.

Judgment.

Upon this sale taking place, *Smyth* removed the mill-irons of a small saw-mill he had erected some years before, and whatever else he had on the premises capable of being removed, and of which he could make any beneficial use; and the property was allowed to pass into the hands of Mr. *Jones*, who continued in possession until the 30th of July, 1827, when he, by deed-poll, in consideration of a sum of £600, not materially variant from the amount of principal, interest, and costs, due on the judgment, granted, bargained, sold, aliened, transferred, conveyed, and confirmed, remised, released, and for ever quitted claim to *Truman Hicock* and *James Simpson*, their heirs and assigns for ever, as tenants in common, two-thirds to *Hicock* and one-third to *Simpson*, of all the estate, &c., of the said *Charles Jones*, either at law or in equity, of him the said *Charles Jones*, of, in, or to the premises in question.

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1827. The act, under the authority whereof the **1846.**
 Rideau Canal has been constructed, was passed in the
 early part of this year, and the canal was in progress
 long before the conveyance next in order was executed,
 which was in

Simpson
v.
Smyth.

1831, January 21. By indenture of this date, between
 the said *Truman Hicock* of the one part, and *James*
Simpson of the other part, the said *Truman Hicock*, in
 consideration of £500, did grant, &c., all his estate, &c.,
 either at law or in equity, in the undivided one-sixth
 part of the said lands, in addition to the one-third
 conveyed to him by the former deed, confirming him in
 the one-half of the entire property.

1831, April 11. By deed-poll, the said *Truman*
Hicock, in consideration of £1000, conveyed all his
 right, &c., at law and in equity, to a further one-sixth
 of the said premises, to the said *J. Simpson* and his
 heirs. Judgment

1831, May. By deed-poll of this date, the said
Truman Hicock, in consideration of £1000, conveyed
 all his right, &c., to the said property, either at law or
 in equity, to *Abel R. Ward*, his heirs and assigns, for
 ever.

1832, February 21. By indenture of this date,
 between the said *James Simpson* and *Abel R. Ward* of
 the one part, and *William Simpson* of the other part,
 it is witnessed that the said *James Simpson* and *Abel*
R. Ward, in consideration of £5000, granted all their
 estate, &c., either at law or in equity, to the said
William Simpson, his heirs and assigns, for ever.

The property having been laid out into villiage lots,
 and otherwise sub-divided, parts thereof have been
 transferred to divers persons at various prices, and at
 the period when the bill in this cause was filed to
 redeem, in the year

1846.

Rimpson
v.
Myth.

Judgment.

1840. A considerable village had extended itself over parts of it; mills, shops, and other establishments for business had been erected, and the property had become of very great value and of vast importance. The chief cause for the great advance in the value of this property was, in my judgment, the construction of the Rideau Canal, the river Rideau at this portion of it forming part of that great national work. If the canal had never been enterprised, the property, from the increase of population, and general improvement of the country, would by that time have probably become a place of some importance as a mill site, and otherwise convenient for general business, but bearing no comparison with the enhanced value occasioned by the construction of the Rideau Canal. The minor facts of the case, which have been stated by other members of the court upon a former occasion, I have not thought it necessary to recapitulate; but I have thought fit to set forth the principal and leading features whereon I found the judgment at which I have arrived, upon the main and indeed only important question which occasioned a division in this court at a former sitting, viz., whether the Court of Chancery in Upper Canada be bound to decree *quasi stricto jure* as of right, redemption of this mortgage upon the facts disclosed and found by the court to exist in this case.

The minor questions I shall shortly dispose of first, then apply myself to the substantial and all important point of the case.

I never entertained a doubt, since I began to practise at the bar, of the utter inefficiency of a sale by execution founded on a judgment at law against a mortgagor, of any interest supposed to remain in him, called the equity of redemption. At common law, assuming for a moment that no equitable jurisdiction had ever existed, the estate of the mortgagee was an estate upon condition, subject to be defeated by the mortgagor performing

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the condition by paying the mortgage money, but until the mortgagor shall have fulfilled the condition or been discharged therefrom, the fee at law is as much and as thoroughly vested in the mortgagee as if there were no condition at all.

1846.

Simpson
v.
Smith.

What is the language of the recitals in every conveyance of mortgaged property after condition broken? Why, that the estate of the mortgagee hath become absolute at law; and is not such language, contained in the recitals in every such conveyance for centuries past in England, the best running commentary upon what was regarded by all men learned in the law to be the consequence of a neglect to perform the condition. It is analogous to the language of records and pleadings in our courts, which are looked upon as the most authentic exponents of what the law is in those cases. I am sure the language of recitals in conveyances which have come under the consideration of courts both of law and equity in Westminster Hall, and after having been subjected to the severe scrutiny of the ablest men at the bar, has in no solitary instance been even suggested to be of doubtful fitness for the occasion.

Judgment.

I am aware that numerous, perhaps hundreds of instances, may be found in our common law courts in Upper Canada, of the supposed interest of the mortgagor having been sold, as in this case, under a "*fieri facias*" against the lands of the mortgagor at the suit of the mortgagee, brought either upon a bond accompanying the mortgage, or on the covenant contained therein, for the payment of the mortgage money; but a host of such ill-advised proceedings constitute no legal precedent, unless sustained by judicial sanction; and I always did, and do still, regard such sales as utterly nugatory and inoperative in law, having no shadow of authority to warrant them. The simple and plain answer to the question, why cannot you sell the mortgaged estate

1846. under an execution, at the suit of the mortgagee against the mortgagor? is shortly this, that the estate belongs to the plaintiff, and not to the defendant.

*Mapson
v.
Baketh.*

Judgment.

How a court of equity looks at the estate, is a totally different question, and has no influence whatever upon the aspect in which a court of law is bound, *stricto jure*, to regard it. In point of equity, however, I am inclined to think, were it necessary to resort to the sale to sustain the appellant's case, that however inoperative as a legal transfer of a supposed equity of redemption, it might receive and ought to be regarded with much favour, as a sale of the estate by the mortgagee for the benefit of the mortgagor, it having been made by his sanction in the most public and advantageous manner for the mortgagor, with a view to realize the incumbrance and return the overplus to the mortgagor; such sale by the creditor would have been quite consistent with the principles of the civil law, whose maxims with regard to mortgages have been very much adopted by our courts of equity, and would be the voluntarily carrying out of a stipulation often inserted in mortgages, authorising the sale of the estate upon condition broken. Such a fair and open procedure, in the absence of any compulsory tribunal to direct its adoption, certainly ought to weigh strongly in favour of the mortgagee under such circumstances, he doing voluntarily precisely what a court of equity would have done, had it been possible to have invoked its authority for the benefit of the mortgagor.

Upon the second point, I concur in the opinion heretofore expressed by this court in this case, that the demurrer having been overruled, and the defendant having submitted and put in his answer, cannot be heard upon appeal against that decision to which he has submitted, and thereby, so far as in him lay, waived the objection.

To the last and most important question, still to be

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disposed of, I have applied myself to the best of my skill and judgment, feeling strongly the deep responsibility resting upon my shoulders under the circumstances in which I am placed, seeing that this court has heretofore been equally divided.

1846.

Simpson
v.
Smyth.

Before entering upon any particular application of the principles, either of law or equity, which have been evoked on either side as bearing upon this question, I shall endeavour to shew what the principle of equity is which is applicable to the redemption and foreclosure of mortgages in England; and shortly to trace the progress of equity as a system of jurisprudence, and as contradistinguished to law as administered by distinct tribunals in England, where I believe the former first took its rise, and in very remote times; and I shall then proceed to consider when equity, in the sense thus explained, came to form part and parcel of the jurisprudence of Upper Canada.

Judgment.

I am very sensible of the difficulty I have imposed upon myself, in thus attempting to define equity as a system of judicial procedure, since to most definitions which have been given, there are, I apprehend, many exceptions to be made, when from generals we descend to particulars.

Our courts of law act upon fixed and determinate principles, which every man is supposed to know, and which constituting the common law of England, every man has a right to appeal to those courts to enforce for his benefit, however harsh or severe the conduct of the party may be who urges their application in the particular instance; and these principles being applicable *stricto jure*, the courts of law never had any discretion vested in them to withhold their application when their exertion was demanded by any suitor. It is manifest, that any strict rule of law, however admirable in itself as a general principle to govern men in their ordinary

1846.

Simpson
v
Smyth.

dealings and intercourse with each other, must necessarily, even in the early stages of society, lead to occasional results inconsistent with the principles of natural justice which the law was intended to promote, and which, if such consequences could have been foreseen, would probably have been excepted from the rule.

It may appear singular, but I believe it to be nevertheless true, that we are indebted to the arbitrary power of our kings in the remote periods of English history, for the first application of that power, which has gradually through the lapse of ages settled into that well defined and very beneficial exercise of lawful authority, at present administered by our Lord Chancellors, called equity.

Judgment. The commencement of this authority, there can be little doubt, arose in the first instance of its exercise from the interposition of the arbitrary power of the sovereign upon petition, either to restrain the unconscientious exercise of a legal right, or to enforce the restitution of that which the ordinary courts afforded no means to the injured party to reclaim.

The exercise of this power by the sovereign, assisted by his great officers in council, being found beneficial at least to the weak and unprotected, became gradually of more common occurrence, and was ultimately transferred to the keeper of the great seal, who on this account probably is called the keeper of the king's conscience, which was the only rule of decision in the exercise of his own arbitrary power; and thus the Court of Chancery has gradually assumed a jurisdiction and extended its authority until the present day, and has moulded for itself, and established upon the broadest foundation, a system of jurisprudence previously unknown in any other country.

The present form of a bill in Chancery, which is in

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the style of an humble petition, and not of a bold demand as at common law of a positive right, affords pregnant proof that the relief sought was not originally demandable as of right, but was sued for to, and granted by, the sovereign at first as a matter of discretionary grace and favour as his own conscience should direct. Moreover, the remedy is altogether *in personam*, either restraining or coercing the party complained against; and in this light I cannot agree with those writers who attribute to equity the office of corrector of the law. It may correct the party who seeks against conscience to enforce the law, but it cannot alter one jot or one tittle of the law itself. It can restrain a party from urging an extreme legal right contrary to natural justice, and it can compel him to restore that of which he has become possessed by the enforcement of a like right in a like manner.

1846.

*Simpson
v
Smith.*

The Court of Chancery cannot obstruct the current Judgment of the law; it can only inhibit a party from availing himself of its power.

In case of a bond with condition forfeited, before the statute Will. III., the Court of Chancery interposed to prevent the obligee recovering the penalty. It did not affect to alter the contract or the law resulting from its breach; but it said, although the law is in your favour, and you have *stricto jure* a right to the penalty, yet it is unjust that you should, under the circumstances, enforce that right, and therefore upon the obligor fulfilling his condition, you shall be perpetually restrained from pursuing your legal remedy.

The exercise of this authority has imperceptibly acquired the sanction of the state, and has moulded itself into a system which, undoubtedly, taking its rise in the stringent application *in personam* of arbitrary power, has become uniform and regular in its application, and guided no longer by arbitrary will, but by sound discretion, and sustained by precedent.

1846.

Simpson
v.
G Smyth.

It is said "that equity being opposite to regular law, and in a manner an arbitrary disposition, is still administered by the king himself, and his chancellor in his name, *ab initio*, as a special trust committed to the king, and not by him to be committed to any other. And it is true that the one (that is, law) is bound to rules, the other absolute and unlimited, though out of discretion they entertain some forms which they may justly have in some special cases."

The learned author of Principles of Equity, in his introduction, observes that "equity, scarce known to our forefathers, makes a great figure; like a plant gradually tending to maturity, it has for ages been increasing in bulk, slowly indeed, but constantly."

Judgment. The same learned author further observes, that causes of an extraordinary nature, requiring some singular remedy, could not be safely trusted with the ordinary courts, because *no rules* were established to direct their proceedings in such matters; and upon that account such causes were appropriated to the king in council. In process of time the pressure of business became so great, that this authority devolved upon the Court of Chancery.

Sir William Jones has traced to the Chief Archon of the Athenians, a jurisdiction analogous to that of our chancellors; and many writers regard the Roman *Prætor* as an officer exercising a very similar authority. Lord Hale says, "touching the equitable jurisdiction of the Court of Chancery, in ancient times no such thing was known;" and he says, "two things might possibly give its original, or at least much contribute to its enlargement—the usual committing of particular petitions in parliament, not there determined, unto the determination of the Chancellor, which was as frequent as to the council, and when such a foundation was laid for a jurisdiction, it is not difficult for it to acquire more. Second, by the invention of uses."

I have endeavoured thus, I fear imperfectly, to trace the cause, origin, and progress of the equitable jurisdiction of the Court of Chancery, which that most eminent judge, Lord *Hale*, says "hath attained *de facto* by degrees that ample jurisdiction in causes of equity, that now it hath in effect swallowed up the courts of law," for the purpose of shewing that as courts of law were bound by strict rules, as before adverted to, equity has been introduced to relieve parties from the consequences of a strict application of them; and that although courts of equity in England have, in modern times, consolidated their jurisdiction, and limited the exercise of the ancient discretionary power, they assumed by precedent, which now restrains courts of equity within known bounds, and regulates their proceedings by fixed rules and settled principles, as certain in their application as those governing courts of law; yet we must not suffer those fixed rules and precedents in the English Courts of Chancery to produce injustice, by applying them here under a totally different concatenation of circumstances, and thereby, in fact, enforce the application of rules of equity adopted by a court under one condition of things, at the instance of a suitor *stricto jure*, under different circumstances, to produce a greater evil than the common law, if left to itself, could have effected.

1846.

Simpson
v.
Smith.

Judgment.

It has been said, by a very learned judge, that as the Statute of Frauds was introduced for the prevention of fraud, it shall not be converted by a party into an instrument of fraud; so, in my judgment, as the Court of Chancery was established for the advancement of equity, it shall not be converted into an instrument of iniquity.

In England, from the earliest period of its exercising authority as a court of equity, the Court of Chancery has been open alike to both parties, and that simple fact preserves a harmony of equity throughout its

1846. extended jurisdiction, so that either party could at all times have appealed to its authority to conclude the other, with regard to their respective rights, in matters within the scope of its equitable jurisdiction.

*Alington
v.
Smith.*

Judgment.

If the mortgagee could appeal to equity to foreclose, so could the the mortgagor invoke the same authority to enable him to redeem his estate. From this circumstance it happens, that after twenty years' acquiescence without reclamation, by analogy to the Statute of Limitations, which, although until lately only binding in courts of law, served as a guide to regulate the discretion of courts of equity, the court will not allow the one party to foreclose, nor the other to redeem, because in the first case it presumes payment, if the mortgagee has suffered his mortgagor to remain in possession all that time, without payment of interest or admission of the debt—although the presumption thus raised is open to be rebutted; so on the other hand, if the mortgagor has suffered the mortgagee to remain in possession twenty years without accounting or without admitting that he holds a mortgage title only, he loses his right of redemption, because he shall be presumed to have *deserted* his equity to redeem.

But in this province, before a court of equity was established, how could any presumption in either case arise?

In the absence of a court of equity, the mortgagee being in possession twenty years could raise no presumption to the prejudice of the mortgagor, who could not compel the mortgagee to account nor disturb him in his possession, or file a bill to redeem; and in the case even of the mortgage of a productive property, it could not be presumed, because the mortgagee received the rents, and took no steps to foreclose and enforce payment, that he was therefore content to receive his interest, and allow his money to remain on mortgage,

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since he had no alternative; and however much he might need his money, and might anxiously desire to call it in, yet in the absence of a court of equity he could not foreclose, and therefore the mortgagor ought not *stricto jure* to be entitled to redeem, so long as he should come within twenty years, however inequitable the attempt might be as against the mortgagee, provided he came within the English rule as to mere time.

1846.

Stampson
v.
Smyleth.

It is said by *Fonblanque*, "that a man can never be injured if he receive principal, interest, and costs," which in England a man is supposed to be satisfied with if he did not file his bill to foreclose; but if there be no court to decree foreclosure, no such presumption can arise, foreclosure being impossible.

It is true the Chancery Act, 7 Wm. IV., ch. 2, sec. 6, declares that the rules of decision in the Court of Chancery, thereby constituted, should be the same as govern the Court of Chancery in England. This enactment I conceive to mean nothing more than that equity, as administered in England, shall constitute the rule of decision in our Court of Chancery, in the same manner, and in the same sense, as the law of England is declared by statute 32 Geo. III., ch. 1., sec 3, to be the rule for the decision of all matters of controversy relative to property and civil rights in our courts of law.

Judgment.

In England it is of course for a mortgagor to redeem within twenty years; and at the same time it is equally of course for the mortgagee to foreclose if he be so minded.

But in Upper Canada, until the Court of Chancery was established, no means existed whereby the mortgagee could foreclose, and therefore on a bill to redeem a mortgage which had become absolute at law, before the establishment of the court, the rule of equity which

1846. would govern the case in England is invoked under circumstances essentially different; and therefore, in my judgment, is not *per se* to be necessarily applied as a stringent enactment, whether the effect produced shall be good or evil. I am of opinion, that before the establishment of the Court of Chancery, those rules of decision, or that system of jurisprudence called equity, as administered in England in the Court of Chancery, did not exist in Upper Canada. For although the word *equity* is used in 32 Geo. III., ch. 1, sec. 4, and occasionally in other acts of the legislature, yet I cannot regard these expressions even as indicative of the legislative mind, that equity as a system had been or was thereby intended indirectly to be recognised as a rule for the decision of questions regarding civil rights, when they abstemiously forbore for half a century to establish any tribunal wherein such a system could be administered.

Judgment.

To declare that equity as a system shall exist, and decline the establishment of a tribunal for its administration, may with great propriety of language be said to be a "*delusion, a mockery, and a snare.*" How can there be a rule which no man can see, and no authority proclaim or enforce? A court of law cannot see an equity, cannot recognise it in its decisions; then how can the subject be held bound to regard as a principle of action that which no tribunal in the land can promulgate?

Equity as a system of jurisprudence is essentially an emanation from the court, and cannot exist without it. The court and its functions constitute a whole. The court is to the principle of equity to be administered there, what the body is to the soul. Destroy the body, and the soul flies away; abolish the court and equity is no longer to be found.

Laying it down, therefore, as a principle, that up to

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the passing of the Chancery Act, 7 Wm. IV., equity as a system had no place in the jurisprudence of Upper Canada as a rule for the decision of matters of controversy relative to property or civil rights, it will be necessary to consider what were the rights of the parties urging a claim to the property in question, at the time of passing of this act, and the consequent introduction of equity as a principle or rule of decision as it previously existed in England.

1846.

Simpson
v.
Smyth.

Although it was, no doubt, common for gentlemen bred to the profession in Upper Canada, where the English law has ever prevailed, to speak of equity as a principle, and to speak of an equity of redemption as a beneficial interest in an estate, with which their reading English books had made them familiar, yet I am constrained to advance it as my deliberate judgment, that no such interest as that existed in Upper Canada, excepting in so far as the common and statute law recognised it and would give it effect. Judgment.

By the 7 Geo. II., ch. 20, it is provided, that where any action shall be brought on any bond, for payment of money secured by mortgage, or for performance of covenants contained therein; or where an action of ejectment shall be brought by any mortgagee to recover possession of any mortgaged lands, if the person having a right to redeem shall become defendant, and shall, pending such action, pay such mortgagee, or in case of refusal shall bring into court the principal, interest, and costs, such payment shall be taken to be in full satisfaction and discharge of such mortgage, and the court shall discharge such mortgagor therefrom accordingly, and shall compel such mortgagee to assign, surrender, or re-convey such mortgaged estate, and deliver up all title deeds to the mortgagor.

When *Sewall* brought the action in 1819 against *Thomas Smyth*, for the debt secured by the mortgage,

1846. the principal, interest, and costs of suit might, under this act, have been paid into court, and *Sewell* ordered to re-convey, which it is plain, from the evidence, he would cheerfully have accepted and done. If *Smyth* were not even then prepared to pay the amount, still he might have continued in possession, and driven the mortgagee to his ejectment after the sale in 1825, and then paid the money into court; whereas on the contrary, he thereupon abandoned the property, removing every fixture which was worth taking away, and voluntarily relinquished possession.

Thus from 1810 to 1825, the mortgagor's equities, which might have availed him had the Court of Chancery existed at the time, might also have been protected by the ordinary courts of law, had he thought fit to invoke their protection, but which he declined; and the estate ultimately passed into the possession of the mortgagee, and his interest at law became effectually foreclosed.

Judgment.

This statute, in fact, affords all the relief to the mortgagor which a Court of Equity could have given while the possession remained unchanged. Upon the mortgagee taking steps to recover possession of the land, which at law would work a foreclosure if the money were not tendered under the statute, the mortgagor had notice that the mortgagee required his money, or would insist on his right to the estate. A bill of foreclosure would have had the same effect, and if the money were not paid within a prescribed period, the mortgagee would have been effectually foreclosed in equity; and if the court of law were not applied to for an order upon the mortgagee under the statute, and the mortgagee allowed to get possession, the same result would be arrived at, at law; the possible difference being, perhaps, a little more delay in equity, through the comparative tardiness of Chancery proceedings as contrasted with those at law. So that it is plain that a party declining to avail himself of the very salutary provisions of the statute, but allowing the mort-

gages to proceed to judgment, and a recovery of possession, has no one but himself to blame, if, after such effectual notice, he make no arrangement to save his estate from forfeiture.

1846.

Hempson
v.
Smyth.

Thus stood the law, in my judgment, before the passing of the Chancery Act, as affecting the rights of mortgagor and mortgagee.

It now remains for me to consider what change was produced by the passing of that statute.

Upon the establishment of a Court of Chancery, all subsequent transactions would come under all the rules and principles of equity, as established by precedent in England; but how equity should have relation back to former transactions consummated before equity existed in the province, is the difficult and important point to be decided.

Judgment.

This question I shall consider, firstly, without reference to the language of the Chancery Act, and solely upon the general principles governing courts of equity left to their own unfettered judgment; and, secondly, with reference to the language of the statute establishing the court.

In my judgment, a Court of Chancery would, upon its own inherent principles of action, take cognizance of any cause arising out of transactions happening before its establishment, as well as after, unless restrained by positive enactment. Equity operates not inversely to the law, but in some cases to restrain persons from exercising their legal rights against conscience, as in the case of a mortgage, for example, of an estate worth £1000 made to secure a smaller sum, say £100.

The time when the jurisdiction became established could not alter the abstract principles of *equum et bonum*

1846.

Simpson
v.
Smyth.

being applied to the case, although it might, and probably would, induce the court to look at circumstances which would not have been regarded had a court of equity always existed.

Take the present case as an instance: had a Court of Chancery always existed to which a party might have appealed to enforce the fulfilment of the original intention of both, viz., that *Sewall* should get his money and interest, and that *Smyth* should retain his estate, there would be no pretence for not holding both to the strict rules of equitable procedure which govern in England; because if *Sewall* wanted either his money or the estate, he could have filed his bill of foreclosure in 1811, and had his money or the land finally assured to him within such reasonable time as the court should assign for the money being paid, or the mortgage standing foreclosed.

Judgment.

If, under such state of the law, he took no steps to foreclose, but simply acquired possession of the estate, any change in its condition or character as a mere mortgagee in possession, would have been at his own peril, seeing that a bill to redeem might have been filed against him at any time.

But in the absence of all equitable jurisdiction, where each party knew that the terms of their contract must bind them at law, unless there were something manifestly and grossly unjust and oppressive in the conduct of the mortgagee, a court of equity would scarcely feel itself warranted in retrospectively interposing its authority to disturb the legal rights of the parties. But to warrant such interference, there must, in my judgment, exist something so manifestly harsh and unjust, and against conscience, as to shock and be offensive to the mind *boni viri*, as the civilians express it. And under such circumstances I feel no doubt but that a court of equity would look back into the transactions, and in the

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Simpson
v.
Smith.

In this case I see no facts to raise any presumption that injustice has been done; on the contrary, I think that the law has done nothing but justice, and such justice as might doubtlessly have been, and would have been, attained by a decree, had a Court of Chancery existed previously to the assumption of possession under the mortgagee.

As to the value of the property, it seems, to say the most of it, to have been but a bare security for the debt.

In the next place, although by law the mortgagee was not bound to sell the estate at all for the purpose of realising his debt, as he might have kept it on condition broken; yet he did, under a misapprehension of the law, cause it to be advertised and sold in a *quasi* official manner, after a year's notice published in the usual mode of sales under sanction of judicial command; therefore practically every thing was done which either a trustee with power of sale or a master in Chancery under a decree of the court could have done, to sell the property for the benefit of all parties for the best price that could be obtained. Therefore, I am of opinion, that there existed no circumstance which would warrant a court of equity in disturbing the legal interests of the parties, the court being left to the exercise of its own unfettered application of the principles governing courts of equity, more especially as the mortgagor may, I think, be regarded as having *abandoned* all claim to it, by not applying for relief under the statute of Geo. II., and also by *removing* the fixtures and whatever else he could beneficially apply to his own use, sanctioning by his silence and non-resistance what was passing under his own observation without objection. He, and the respondents, since the death of the mortgagor, saw the property passing from hand to hand; witnessed the vast improve-

Judgment.

1846.

Smyth
v.
Smyth.

ments going on ; and one of the respondents, *Terence Smyth*, in a letter, dated 10th of May, 1832, addressed to *James Shaw*, a person about to purchase part of the premises from *A. R. Ward*, one of the appellants, and who shortly afterwards did purchase, stating, that "the title depended upon the legality of the sheriff's deed, together with his father's right of redemption agreeable to the laws of England with regard to mortgages ; but in his (*Terence Smyth's*) opinion, he (*Shaw*) or any other person might purchase without any fear of being disturbed by his father."

It is a clear principle of equity, that where a person claiming an interest in land lies by, and by his silence with regard to his own claim encourages another to expend money upon the estate under an erroneous opinion of title, he shall be restrained in equity from affirming his title to the prejudice of the other so lulled into security.

Judgment.

Qui tacit, consentire videtur ; qui potest et debet vetare, jubet, si non vetat. The mortgagor should undoubtedly have protested against what was being done, and should have warned the parties of his intention to apply to a court of equity, should such a tribunal ever be established ; but he did nothing of the kind, and allowed possession to be taken. I do not mean to say that such protest would have altered the case as to the rights of the parties, but it would have rebutted the idea of an intention to abandon his claim in equity. It does therefore appear to me, that when a party with a full knowledge of his position makes no effort to defend it, but voluntarily abandons and deserts it, and sees those whom he has let in under a claim of right, using the property, and dealing with it as their own, and expending large sums in its improvement without remonstrance, he cannot be regarded in any other light than as sanctioning, by his silence, what is passing under his own eye without objection.

If a party voluntarily pay a doubtful demand, and

decline defending himself against what he regards as an unfounded claim, he cannot afterwards become plaintiff and recover back the money so voluntarily paid.

1846.

Simpson
v.
Smith.

Inasmuch, therefore, as the mortgagor neglected to avail himself of the protection which the courts of law could have afforded him under the statute 7 Geo. II., I think he must be regarded as giving the mortgagee, and those claiming under him, to understand that he abandoned the property in payment of the debt.

I am also of opinion, that the subsequent great rise in value of this property, occasioned chiefly by the construction of the Rideau Canal, the rapid growth of a village, since become a place of considerable importance by the enterprise and capital of the appellants, and those claiming under them, constitute no meritorious ingredients in the respondent's claim for relief.

Judgment.

We all know, that it is to the expenditure of capital that situations the most eligible owe their value, by bringing them into notice, and attracting population to participate in the local advantages of new settlements; and it would be no compensation to the first adventurer, who risked his means in commencing a settlement, and developing the capabilities of the place, after having spent the most valuable period of his life in establishing an extensive business in the midst of a wilderness, drawing a considerable population around him, attracted by the activity to which he had given the first impetus, to have his own improvements valued, and an improved rental set upon the land which owed all their value to his own capital, enterprise, and exertion, and striking a balance, to order it to be paid to him, and then to quit the scene of all his hopes for ever.

In my opinion such a person is as much entitled to the enhanced value of the grounds, as he is to the costs of the buildings and other improvements he

1846. have constructed, as the one is, especially in a new country, incident to the other. If a man shall have laid out his capital recklessly upon what he knew he had no title to, the case would be very different; but if, acting *bond fide*, he is entitled to every consideration that a court exercising a wise and sound discretion, can extend to him; and unless constrained by some clear and positive enactment, I should feel great repugnance in disturbing the legal title of persons presenting themselves so favourably to the notice of the court, under the notion that a rule of equity, as applied in a different state of things, and under very different circumstances, would have been regarded as too well settled to warrant a departure from its rigid application.

Upon the fullest consideration, therefore, that I can give to this case, I am of opinion that, independent of any enactment which may be supposed to enjoin a different conclusion, the respondents have shewn no equitable ground for relief, and that their bill should have been dismissed with costs.

Judgment.

I come now to the last point of this important case, the construction to be put upon the 11th section of the Chancery Act, which his Honour the Vice-Chancellor, in the court below, supported by the opinion of Mr. Justice *Macaulay*, and Mr. Attorney-General *Smith*, as members of this court at the first argument, has regarded as imperative upon him, against the real equity of the case, as I understand their judgments, to declare that the respondents are, if I may so express myself, *stricto jure* entitled to redeem.

If I thought that the clause in question required the construction they have put upon it, I should, as a matter of duty, though with deep regret, say *fiat justitia ruat cælum*, and dismiss this appeal; but I am of a contrary opinion, and while I entertain the highest respect for the opinion of Mr. Justice *Macaulay*, who has so elabo-

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rately discussed this question, yet I cannot, upon this occasion, see any ground for the conclusion at which he has arrived.

1846.

Simpson
v.
Smyth.

The 11th section of the Chancery Act, 7 Wm. IV., ch. 2, is in the following terms :

" And whereas the law of England was, at an early period introduced into this province, *and has continued to be the rule of decision in all matters* of controversy relative to the property and civil rights ; while at the same time, from the want of an equitable jurisdiction it has not been in the power of the mortgagees to foreclose, and mortgagors being out of possession have been unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators, or assigns, may be found to be attended with peculiar equitable considerations, as well in regard to compensation for improvements as in respect to the right to redeem, depending upon the circumstances of each case, and a strict application of the rules established in England might be attended with injustice : be it therefore enacted, that the Vice-Chancellor of the said court shall have power and authority in all cases of mortgage, where before the passing of this act the estate has become absolute in law by failure in performing the condition, to make such order and decree in respect to foreclosure and redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators, and assigns, as may appear to him just and reasonable under all the circumstances of the case, subject, however, to the appeal provided by this act."

Judgment.

It appears to me, in the first place, that the first part of the preamble is conceived in terms inconsistent with any idea that the legislature considered that equity, as a

1846.

Simpson
v.
Smyth.

system of jurisprudence, had previously existed in Upper Canada under the general term "law of England," because it recites that the law of England was, at an early period, introduced and had continued to be the rule of decision; and yet from the first establishment of the rule there spoken of (which I regard as the rule of law only, and as contradistinguished from equity) no decision according to it in any question of equity had ever been made, if equity be insisted on as being included in the rule from the time of its establishment to the passing of this act, a period of nearly half a century; and therefore it cannot be said to have been and continued to be a rule of decision, when no decision ever had been, and, during all that time, could not have been made according to it; *lex neminem cogit ad impossibile*; and when 32 Geo. III., ch. 1, sec. 3, says that resort shall be had to the law of England as the rule for the decision of the same, it must mean such law as resort could be had to.

Judgment.

And there is nothing inconsistent with the interpretation in the next branch of the sentence, reciting, that for want of an equitable jurisdiction mortgagees could not foreclose, nor could mortgagors avail themselves of their equity of redemption, because an equity to redeem might and would exist when appealing to the conscience, although there might not exist any means for enforcing obedience to its voice.

The latter part of the preamble recites, that a strict application of the rules established in England, might be attended with injustice; shewing conclusively that the legislature did not intend to fetter the discretion of the court when called upon to exercise its functions in a new sphere of action; and although the preceding words, "as well in regard to compensation for improvements, as in respect to the right to redeem," might seem at first to indicate the objects to which this relaxation of English rules is intended to apply; yet upon a closer examination, I think they can only be considered as put for examples, rather than as terms of limitation. The

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enacting part of the clause is couched in as general terms as could well have been devised, to give a most thorough discretion to the Vice-Chancellor to make such order and decree in respect to foreclosure and redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the parties, as may appear to him just and reasonable under all the circumstances of the case—words which do not appear to me to make it quite discretionary with the court, under all the circumstances of each case, to decree redemption, or refuse it.

1846.

Simpson
v.
Smyth.

If, upon a bill to redeem, the Vice-Chancellor should be of opinion, under all the circumstances of the case, that it would be neither just nor reasonable to allow the mortgagor to redeem, it would be his duty to dismiss the bill, which in effect would amount to a foreclosure; and such order would be in respect both to foreclosure and redemption, it would be a decree in favour of foreclosure, and against redemption. It is not essential that a decree or judgment should be in favour of a given proposition, to constitute it a decree or judgment *in respect* of such proposition. If the decision be against the proposition, it would be as much *in respect* of it as if it had been in favour of it. Neither do I regard the words redemption and foreclosure as applying to a bill filed for the one object as well as for the other; and I cannot concur with Mr. Justice *Macaulay* in thinking that this part of the clause is to be construed *reddendo singula singulis*, considering the word redemption as having solely a reference to a bill filed by the mortgagor, and foreclosure to one filed by the mortgagee. Judgment.

With regard to compensation, the legislature evidently meant to enlarge, if necessary, the discretion of the court in decreeing all just allowances for improvements in cases where the court should feel it right to decree redemption; seeing that in England a mortgagee has no right to alter the nature of the property mortgaged, by

1846.

Simpson
v.
Smyth.

turning a dwelling house, for example, into a shop. But in a new country, where property is undergoing continual change in every hand it passes into, it would be retarding enterprise to hold, that however advantageous such an alteration might be for whoever might be the owner, no change should be made. The circumstances under which the change may have been made, are all fit for the consideration of the court; and this clause removes any ground for scruple when regarding English precedent.

Under the very comprehensive terms used in the latter part of this section, "and generally to make such order and decree with respect to the rights and claims of the mortgagor and mortgagee, as may appear just and reasonable under all the circumstances of the case," it may be worthy of consideration whether, in some cases, it would not be just to require the mortgagee to pay an additional sum to the mortgagor, bearing a relation to the value of the property when it fell into the hands of the mortgagee, particularly when the mortgagee had made such extensive improvements as not to be within the power of the mortgagor to make compensation for.

Judgment.

But I am of opinion that the court would have possessed full discretion to have accommodated its decisions to the peculiarities incident to the novel condition of things existing at the time of the establishment of the Court of Chancery, and that the 11th section of the Chancery Act ought to be regarded as a provision introduced by the legislature *ex majori cautela*, rather than of necessity; and this construction I regard as important to prevent the very inconvenient construction that might otherwise prevail, of considering every thing not expressly provided for as intentionally omitted, which I feel satisfied would be found occasionally of most mischievous consequences.

We cannot keep too prominently in our minds, that equity is inherently a discretionary principle in its

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application. And although it be discretionary, the discretion of a court of equity, like that often exercised by courts of law, must be a sound discretion, governed by rule and not by humour; it must not be arbitrary, vague, and fanciful, but regular, and guided by precedent—a character which it has acquired by having for ages past been administered in a regular course of judicial procedure, in a court clothed with the highest judicial powers, administered by great numbers of learned, wise, and upright judges, who have moulded the arbitrary power, at first exercised by the sovereign, and afterwards delegated to them by the Crown, into a regular system of judicial administration, constituting at the present day equity jurisprudence.

1846.

Simpson
V.
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But if the rules and precedents established by the court itself, for the government of its own discretion, be once reduced by legislative enactment into fixed rules to guide the court in its decision, inflexible and mandatory upon those who are to be governed by them, the whole character of the rules becomes changed; and having become of positive obligation they cease to be a guide to discretion, but become fixed laws, and then no longer rules of equity, but positive institutions; and having thus changed their character, they will likewise change their place of administration from courts of equity exercising extraordinary, to courts of law exercising ordinary, jurisdiction, which would in all time coming be bound to enforce them.

Judgment.

If it were enacted by parliament, that notwithstanding a mortgagor had failed to perform the condition for redemption, by payment of the mortgage money at the day, nevertheless that he should be entitled to redeem within twenty years, the remedy of the mortgagor would be in a court of law, unless there were some peculiar circumstances to give Chancery an equitable jurisdiction. He might tender his money, and bring an ejectment.

1846.

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The legislature cannot change the nature of things, making equity law, and law equity at their pleasure, and still preserving the pristine character of either.

Take from equity its discretionary character, and enforce its regular application by positive parliamentary enactment, and it ceases to be equity the moment it becomes law; the principle of equity would be merged in the stern mandate of the law.

Lord Coke, in speaking of the Court of Chancery, says it possesses an ordinary jurisdiction according to the common law, and an extraordinary jurisdiction according to the rule of equity *secundum equum et bonum*.

How, by ordinary rule or law, can you arrive at an extraordinary decision? Parliament can no more enact rules for deciding what is equitable *secundum equum et bonum*, than truth in morals can be proved by mathematical demonstration.

Judgment.

I cannot therefore presume that the legislature, intending to establish a court to administer equity, could have also intended to fetter its administration with inflexible rules which might, and occasionally would, as in this case, frustrate that intention, and compel the court to pronounce a decree which it felt would result in nothing less than manifest injustice.

There being no positive law, that a mortgagor shall have a right to redeem within twenty years, that right, if it exist at all, is merely an equitable one; and therefore, if under all the circumstances of the case, the court shall be of opinion that it would be inequitable to allow him to redeem, how can he have an equity of redemption, unless it be on the foot of a strict right which the court cannot restrain, or refuse the execution of; in which case it would not be an equitable, but a legal right, and

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then not an *equity* but a *right* to redeem. And it is no impeachment of the judgment of the court refusing to decree redemption, to allege that between the same parties, under the same identical facts and circumstances, the court, upon a bill filed by the defendant against the plaintiff to foreclose, undoubtedly as in this case would decree foreclosure; because the prayer to foreclose necessarily embraces a permission or offer to redeem, and therefore it does nothing against the will of either party. If the appellants had been willing that the respondents should have been at liberty to redeem, and had filed a bill to foreclose, unless the respondents redeemed within the time prescribed by the court, they could not have objected to their request being granted; neither could the respondents object, as that would be precisely what they wanted, unless they declined redemption altogether, in which case the whole proceeding would pass as it were by the consent or concurrence of all parties.

1846.

Simpson
Smyth.

Judgment.

The question with reference to the Statute of Limitations, taken either as a prescribed period, or as affording a safe guide for regulating the discretion of the Court of Chancery in that respect, is not in a case arising before the establishment of the court, whether the equity be barred by the time, or by the court be *extinguished* or *rejected*, though put forth within time; but whether, under the circumstances existing, at a period when equity as a system of jurisprudence formed no part of our judicial polity, the court can or ought retrospectively to *raise* an equity, and not whether they are restrained by the Chancery Act, sec. 11, from *extinguishing* it. Such a view of the question always assumes that within twenty years an equity to redeem *exists*, which is begging the whole question; whereas you must first determine whether there be an equity, and if that question be decided in the negative, viz., that the party has no equity, then it becomes unnecessary to consider the question of time.

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Smyth.

Having given this very important case the fullest consideration which I have been able to bestow upon it, I am of opinion,

First, that as a system of jurisprudence, equity was not, by the statute 32 Geo. III., ch. 1, sec. 3, as part of the law of England, constituted a rule of decision in any matter of controversy in Upper Canada.

Secondly, that up to the period of the passing of the Chancery Act, 7 Wm. IV., ch. 2, equity, as a system of jurisprudence, had no place in judicial contemplation in Upper Canada, and could neither have been recognised nor exerted.

Thirdly, that mortgages, up to the passing of the Chancery Act, were simply conveyances upon condition; and the estates thereby pledged liable to absolute forfeiture at law; subject, however, to redemption after condition broken, under the provisions of the statute 7 Geo. II., ch. 20.

Fourthly, that upon the establishment of a Court of Chancery, such court might exercise its equitable jurisdiction retrospectively, and by its own inherent principles, without any legislative aid.

Fifthly, that the 11th section of the Chancery Act must be regarded as having been introduced more out of greater caution than of necessity; and that the Court of Chancery, without the aid of that provision, might have afforded the same relief which that section would seem to authorise.

Sixthly, that there is no restraining quality in that clause limiting the court in the fullest exercise of its equitable principles, in relation to the redemption and foreclosure of mortgages, or in any decree tending to constrain the court against its own sense of equity to decree redemption, when it would not have done so had there been no such provision.

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And lastly, I am of opinion that the equities of this case are all with the appellants, and that the decree of the court below should be reversed.

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Simpson
v.
Smyth.

McLEAN, J., concurred.

Decree of his Honour the Vice-Chancellor reversed, and bill dismissed.

Mr. *Blake* asked for the costs in the court below.

Mr. *Esten* considered this a case in which the court would not give costs; the bill had been sustained by the judgment of his Honour the Vice-Chancellor, and this court on a former occasion had been equally divided in opinion.

ROBINSON, C. J.—And you think it would be unreasonable to expect the respondents to have been better advised upon the law than his Honour and one portion of this court. We will take time to consider the question; in the meantime let the costs be reserved. Judgment.

On a subsequent day the court directed an order to be drawn up, dismissing the bill with costs.

1847.

IN THE EXECUTIVE COUNCIL.

[*Before the Hon. the Chief Justice; the Hon. J. B. Macaulay, Ex C.; the Hon. Jonas Jones, Ex. C.; the Hon. H. J. Boulton, Ex C.; the Hon. R. S. Jameson, Vice-Chancellor; and the Hon. Mr. Justice McLean.*]

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between ISABELLA BABY, Appellant, and COLIN MILLER, and JANE MILLER, his wife, DAVID J. SMITH, and others, Executors of HUGH EARL, deceased, respondents.

Will, construction of—Cumulative legacies—Charge.

18th & 27th March, 1847. A testator, by his will, gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail; and in a subsequent part of the will adds, "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. Baby, at Hamilton:" by a codicil, executed on the same day as the will, after making certain alterations in his will, he adds, "And I do hereby devise to my niece, Mrs. Baby, of Hamilton, the lot containing one-fifth of an acre fronting on School Street, in the town of Kingston." Held, first, affirming the decision of his Honour the Vice-Chancellor, that the words "I wish and desire" were not precatory merely, but directory, and formed a charge upon the residuary estate; and held, secondly, reversing the judgment of his Honour, that the devise, in the codicil, of the town lot in Kingston, was cumulative, and not substitutional.

Mr. Mowat and Mr. Vankoughnet, for the appellant.

Mr. Blake and Mr. Galt, for the respondents.

ROBINSON, C. J.—*Hugh Earl, Esq.*, on the 17th of January, 1841, made his will, as follows:

"First, I give and bequeath to my beloved daughter *Jane*, all the personal property which I now own."

"Secondly, I give, devise and bequeath to my said daughter, all the real property of which I shall die possessed, to hold to her during her natural life, and

to the heirs of her body lawfully begotten, excepting the devises hereinafter contained."

1847.

Baby
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Miller.

He then devises the remainder over, in default of issue of his said daughter, to two of his nephews, *William Beggs*, of Whitby, in this province, and *Charles Beggs*, of Dunkirk, in the United States, to *James Hamilton Blane* and *John Earl Blane*, of Dundee, in Scotland, and his nieces *Jane Douglas Blane* and her sister, if then living, and to the children of his late sister *Margaret*, and to the heirs of their bodies as tenants in common. He then devises to his niece *Sarah*, then living with him, a certain town lot in Kingston, in tail, and directs his executors to rent the same for her benefit.

He then gives and bequeaths to his niece *Margaret*, then in New Brunswick, the sum of £12 per annum, to be paid out of the rent of a farm of his in New Brunswick.

Judgment.

He then adds, "I wish and desire that my daughter shall make a competent provision for my niece Mrs. *Baby*, at Hamilton."

He devises to his nephew *William Beggs*, some land in Whitby in fee simple.

He gives to his niece *Sarah*, the interest accruing due on a certain promissory note, to be paid to her half-yearly during her life.

He makes specific bequests of certain articles of small value away to other personal friends, and appoints *D. J. Smith*, *John R. Forsyth*, and *Charles Stuart*, Esquires, his executors.

On the same day, and in the presence of the same witnesses, he executed a codicil in these words, "whereas I, *Hugh Earl*, of, &c., have this day made my last will

1847. and testament in writing, (now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof.) I do hereby give and bequeath to my niece *Sarah*, in addition to the bequests contained in my said will, the sum of fifteen pounds currency per annum, to be paid to her half yearly from and out of the rents of the property which I now own, and it is my desire that my said niece *Sarah* and Mrs. *Robertson* shall remain in my house till my daughter arrives from Europe."

Baby
V.
Miller.

Judgment.

He then on the same day executes a second codicil in these words, "whereas I, *Hugh Earl*, of, &c., have this day made my last will and testament in writing, and have also made a codicil thereto, and whereas I have in my said will devised certain property to *James Hamilton Blane*, *John Earl Blane*, *Jane Douglas Blane* and her sister, and the children of my late sister *Margaret*, now I, the said *Hugh Earl*, being desirous of altering my said will in respect of the said devises, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as a part thereof, and I do hereby revoke the said devises by my said will given to the above mentioned persons, and to the heirs of their body, and I do also hereby revoke the devise in the said will contained to *Charles Beggs* and the heirs of his body, and I do hereby devise all my real property, in case of the decease of my daughter without lawful heirs, to *William Beggs*, of the township of *Whitby*, and to the heirs of his body for ever; and I do hereby devise to my niece, *Mrs. Baby*, of *Hamilton*, the lot containing one-fifth of an acre fronting on *School Street*, in the town of *Kingston*, and opposite to the lot devised in my said will to my niece *Sarah*, the said lots being numbered 240 and 241, respectively, to hold to her and the heirs of her body for ever. And I do hereby direct that all my debts and funeral expenses be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executors from any portion of my estate."

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This later codicil is not executed in the presence of all the same witnesses as the other; both are attested in these words, "signed," &c., and declared by the said *Hugh Earl* "as and for a codicil to be added to and considered part of his last will and testament, in the presence of us," &c.

1847.

Baby
v.
Miller.

Mrs. Baby, the appellant in this suit, who is a widow, filed her bill against the respondents, praying that a competent provision be decreed to be made to her out of the property, real and personal, devised and bequeathed by the will to *Jane Miller*, the testator's daughter.

The respondents put in their answer, in which they admitted that the testator died possessed of personal property to the value of £275, and of real estate to the value of about £2000. But they submit to the court, that the devise in the will of a competent provision to be made to the appellant, is in effect revoked by the second codicil, which devises to the appellant a specific portion of the testator's real estate, which would otherwise under the will have gone to the respondent *Jane Miller*, and out of which, together with the personal estate, the competent provision was to have been made.

Judgment.

His Honour the Vice-Chancellor took that view of the effect of the codicil, and dismissed the bill with costs, but the cause being afterwards re-heard upon petition, his Honour reversed that part of the decree which regarded costs, and ordered that the bill should stand dismissed without costs to either party, the appellant paying to respondents the costs of the re-hearing.

The decree of the Vice-Chancellor is appealed from.

We must first consider how the case would stand upon the will alone, if there had been no codicil; it was contended in the argument before us, that even in that case

1847. the court could not rightly have decreed a provision to the appellant; that the words "wish and desire" amounted to a mere recommendation to the discretionary bounty of the daughter; that in the language of many cases on this subject they were merely precatory, and not binding on the devisee of the residuary estate, and furnished, therefore, no ground for a compulsory decree.

Baby
v.
Miller.

Judgment.

Secopdly, that such a direction could not be carried into effect on the footing of a trust binding on the devisee, because it was wholly uncertain what would constitute a competent provision, and there was nothing definite for the court to act upon. On this part of the case his Honour's opinion was in favour of the appellant, and we think rightly. I do not indeed imagine that the respondents had much expectation of leading us to a different conclusion on that point. The cases which bear upon it are very numerous, most of them were cited, and after an examination and a comparison with the terms of the will, we have no doubt that we must hold the words "wish and desire," when thus used by a person having a right to control, to be equivalent to a direction, unaccompanied as they are by any words tending to limit the expression to a mere recommendation to the daughter's favour, and leaving her to make a provision or not according to circumstances which she was to judge of, such as the behaviour and merits of the party the claim of others, &c. It is upon such qualifications of the devise expressed by the testator, that the doubts in such cases have turned, and then the courts could not but feel that if they were to make a compulsory decree, they would be contravening the will of the testator, by assuming a discretion which he had reposed in other hands. There is nothing of the kind here; it is true that Mr. *Jarmin*, in his *Treatise on Wills*, considers, as other authors do who have written recently on the subject, that the tendency of the courts in the present day is to refuse to give effect to this kind of language in wills as sufficient

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to create a trust; but I cannot say that when we examine the decisions they refer to as evidences of this inclination, there is any clear appearance of a change in the doctrine and practice of the court. Any cases in which the courts have refused to recognise a trust as created by a will of this description, are cases which it can scarcely be supposed would have been at any time otherwise decided, and certainly they are not cases which could with any propriety be allowed to govern the present, being substantially different in their circumstances.

1847.

Baby
v.
Miller.

If the testator had, instead of "a competent provision," inserted a sum of money, or an annuity, leaving all the other words in that clause of the will the same, no one could doubt that his *wish* and *desire* that the devisee of his real and personal estate should pay his niece such sum of money, would have bound her if she took the estate. I take it to be the law still, that words of a testator intimating a request, wish, or desire, are sufficient, when they are so plain and unequivocal as in this case, to create a trust, provided there be certainty of the gift and of the *object to be benefitted*. (a) The authorities on this point are collected in a note to the case of *Harding v. Glyn*, and we find no modern decision conflicting with those cases to such an extent as to create any difficulty in adhering to them, so far as this will is concerned.

Judgment.

Now if this point be as clear of doubt as I apprehend, the only other ground on which a question can be raised upon the will, taken by itself, is, that instead of a sum of money, or any thing specific, the will *directs* (for so I regard it) that the testator's daughter and residuary devisee shall make a *competent provision* for this appellant.

(a) *Pushman v. Filleter*, 3 Ves. 7; *Cole v. Turner*, 4 Russ. 376; *Mirehouse v. Scalfs*, 2 M. & C. 695; *Foley v. Perry*, 5 Sim. 138; *Medlicote v. Bowes*, 1 Ves. Sr. 207; *Cary v. Cary*, 2 S. & L. at p. 189; *Harding v. Glyn*, 1 Atk. 469; 2 Jarmin on Wills, 538; Vin. Ab. Charge D. Pl. 15.

1847.

Baby
v.
Miller.

Judgment.

But we do not find that we should be warranted in holding that there is such an uncertainty here as must make the direction of no effect; the difference between such a direction and some that have been held too uncertain, such as where a testator directed "handsome gratuities" to be given to A. B. and C. D., is quite obvious. It is very common to direct, in wills, that a suitable maintenance shall be provided for, or a suitable education given, &c., to some object of the testator's bounty, and there is sufficient certainty in such directions to admit of their being carried into effect without a mere arbitrary exercise of authority on the part of the court. What may be *competent* under the circumstances, is a matter of evidence, having all the circumstances in view: if A. B. were to take an estate upon the consideration of making competent provision for the person conveying it, and were to give his bond or covenant to that effect, I conceive he would be liable in an action to pay such damages as a jury might assess, if he failed to make a provision. The undertaking would be sufficiently certain for a court of law to enforce, and not less sufficient for a court of equity, which acts on the conscience of the party, and upon a perfect investigation into all the circumstances.

In the case of *Abraham v. Alman*, (a) though the court thought it could not give effect to the will, for reasons which, if clearly satisfactory, were peculiar to that case, yet I think it apparent, that such a direction as this will contains would not have been felt to create any difficulty. That case, indeed, and the case of *Broad v. Bevan*, cited in the note to it, are sufficient to shew that upon the face of the will before us, if there were nothing else in the case, the appellant might well claim in a court of equity to have a competent provision decreed against the residuary devisee and legatee.

So far we agree in opinion with his Honour the Vice-

(a) 1 Russell, 509.

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Chancellor. Upon the other point in the case we find ourselves constrained to differ. We do not consider that the gift of a competent provision, made by the will, is revoked by the second codicil. We look upon the gift of the town lot as cumulative, not as substituted in place of the other. This is a question proper to be decided upon the face of the will and codicils alone, as I apprehend; though there are to be found cases, in which regard seems to have been paid to the circumstances of the estate or other matters external, to aid in determining whether the latter bequest is to be taken as in place of the other, or in addition to it. If, however, the value of the town lot given by the codicil, or the circumstances of *Mrs. Baby*, could have been considered as material in deciding the question, there was no evidence on these points before the court, and the case is in fact left to turn upon the documents themselves. The general principle undoubtedly is, that the legacies, devises, &c., so given or made, are to be taken as intended to be in addition, and not that the last gift revokes the first; but the intention is to govern, wherever that can be discovered, as it often may. Accordingly, in the great multitude of cases of this description, which it would be tedious to refer to, the courts have held one way or the other, according to the indications which they thought the will afforded of the testator's intention; taking it for granted, as at the present day at least they do, that where there is no ground afforded for a contrary inference, the testator means that the legatee should take all that he has given.

1847.

Baby
v.
Muller.

Judgment.

Now, on the face of this will, I see nothing that we could rely upon as shewing the testator's intention, that because he had given to this niece (the appellant) a town lot, she was therefore not to have the competent provision which he had assigned to her by his will. He had given his other niece *Sarah*, by his will, a town lot, in the first place; then he gave her the interest of a certain promissory note, which might or might not produce her any thing in fact, upon which I should think

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Baby
v.
Miller.

Judgment.

the testator had some doubts, for by the first codicil he gives her £15 a year in addition, which we may reasonably suppose he meant to be a barely competent provision, something that would keep her above want, but something which might be required for that purpose, notwithstanding his gift to her of a town lot. Then with regard to his other niece, (this appellant,) he takes up the subjects in an inverse order; he first desires, by the will, that she shall have a competent provision, and then on the same day, in a codicil, gives her also a town lot. Both these objects of his bounty stand in the same relation to him. The town lots which he had given to each, respectively, stand on the opposite sides of a street in the same town. In the absence of all means of judging by comparison, we cannot safely assume otherwise than that the lots were of a similar value; and that the testator's nieces might require to have, and that the testator might reasonably intend they should have, a like degree of support from his estate. If so, then we should be disturbing his arrangements, by leaving with the one both the pecuniary provision and the town lot, and compelling the other, because she got the town lot, to give up the pecuniary provision, though that, for all we know, might leave her without a competent maintenance, or any thing approaching to it. We have no means of saying that the one is any thing like an equivalent for the other. The testator has not declared that he intended it to be a substitution. It is urged that he has done so negatively at least, by inserting, in the case of the second gift to *Sarah*, the words "in addition to the bequests contained in my will," while he uses no such words when he gives the second gift to the appellant. But besides that it has been decided, that the mere circumstance that such words are used in one part and not used in another of the same will, cannot be taken to be conclusive upon the point; it is to be considered that the additional bequests to the nieces are contained in distinct codicils, and though signed on the same day, they may not have been written by the same hand; they are

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attested by different witnesses. One person drawing such a codicil may have thought it well to insert the words, in addition, from greater caution; another might be aware that it was unnecessary, for that the law would so hold if nothing to the contrary were said. In regard to the niece *Sarah*, besides, the testator might imagine, if the town lot were of much less value than £15 a year, that the giving her afterwards that annuity would be deemed a cancelling of the less valuable gift, and so that it would be safer, as he meant otherwise, to express it as in that codicil he does. But he could hardly have conceived, that where he had by his will given any gift of a pecuniary nature to his niece *Mrs. Baby*, (such as his direction that she should be competently provided for,) that the mere gift of a town lot, which may or may not have been worth £10, would cancel the other. It most clearly would not in any such case, and it could not seem reasonable to any testator that it should, unless indeed the land amounted to a competent provision, which we are not at liberty to assume, especially as the town lot is not devised to her in fee simple. And it was urged with reason, in the argument, that any inference that could be drawn from inserting the words "in addition" in one codicil, and omitting them in the other, is at least neutralised by the circumstances that in the second codicil, which contains the gift of the town lot to the appellant, the testator has expressly declared what parts of his will he meant to revoke by that codicil, and does not revoke the direction in the will, that the appellant shall have a competent maintenance, while he does in terms revoke the other provisions in his will; and in the body of the same codicil declares in express words that what he was thereby directing "should be annexed as a codicil to his will, and taken as part thereof;" that is, as a part of the will as it will stand when those parts only are revoked which he in terms revokes, leaving the unaltered parts and the codicils to be read together. On the whole, I should think the case afforded no room whatever for doubt, if it were not for the consideration which

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Baby
v.
Miller.

Judgment.

1847. induced his Honour the Vice-Chancellor to dismiss the bill, namely, that the town lot devised by the second codicil, is so much taken from the residuary estate devised by the will to the daughter, out of which alone she could be called upon to make the provision; and that the appellant therefore cannot have both. No doubt in many cases that would be clearly the effect; and it might be evident upon the face of the will, that it would be unjust and absurd to hold otherwise; but this case, knowing no more of it than we do, does not stand before us as a case of that kind. It may, or may not, for all that appears, be reasonable and consistent, that the daughter should afford a competent provision to the appellant, although the codicil has taken this town lot from her. If we were to hold that the two cannot stand together, then we must hold, that if the testator had, by the codicil, given the minutest portion of the real estate, or any trifling article of personal property, to the appellant, (for by the will the daughter takes the residue of both,) she must give up all claim for maintenance. We do not find that the cases lay down any such principle in the abstract, and it would be extraordinary if they did, for it would generally run counter to the intention of the testator. If indeed it should turn out, when the proper enquiry comes to be made, that the town lot devised by the codicil, goes far towards supplying a competent provision; or that being taken away, it leaves so little with the residuary devisee, that she has not the adequate means which the will contemplates, of complying with the direction in that respect, then we must suppose that upon the master's report, due allowance will be made for the facts as they shall appear; but on what is disclosed to us, we do not think that the codicil deprives the appellant of the claim to a competent provision under the will, in measuring which it would no doubt be right to take into account what the town lot in question can properly be reckoned upon for supplying towards that purpose; a provision may be competent with it, which would not be competent without it; and the possession

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Judgment.

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of that property, as well as other circumstances of the appellant, are to be taken into consideration ; for it is only a *competent* provision, all things, of course, considered, which the appellant can claim. The will and codicils are to be all read as forming the testator's will, and the effect of them is, to give certain gifts and benefits to others ; and to his daughter what remains after his directions have been carried into effect.

1847.

Baby
v.
Miller.

Following the course taken by the court in the case of *Broad v. Beavan*, which I have referred to, we are of opinion that the decree which has been made should be reversed, and that we should declare that the appellant is entitled by the will to a competent provision, to be made out of the estate devised to *Jane Miller* ; that the master shall enquire and report upon the condition of the appellant, and the circumstances of the estate, as was done in that case, with a view to such order being made in favour of the appellant, as his Honour on the master's report shall find to be most just and convenient in reference to all the facts of the case.

Judgment.

1847.

IN THE EXECUTIVE COUNCIL.

[Before the Hon. J. B. Robinson, Chief Justice ; the Hon. J. B. Macaulay, Ex. C. ; and the Hon. H. J. Boulton, Ex. C.]

ON AN APPEAL FROM THE DECISION OF HIS HONOUR THE VICE-CHANCELLOR OF UPPER CANADA.

Between JOHN TORRANCE and WILLIAM LUNN, Appellants, and ROBERT PILKINGTON CROOKS, and others, Respondents.

Practice—Supplemental answer.

August 25,
26, and 28,
1847.

A bill having been filed against trustees and executors, residing at Montreal, in the province of Lower Canada, for an account of the estate of the testator, who at the time of his death, and for some years previously, had been domiciled there; the trustee, &c., although not obliged to do so, had appeared to, and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper Canada, and what they would have incurred according to the laws of Lower Canada, but which at the time of filing their answer they were not aware did exist; they then moved the court, upon affidavits setting forth these facts, to be allowed to file a supplemental answer, for the purpose of stating the fact of foreign domicile, and the law of Lower Canada, according to which alone they had always acted. *Held*, that under the circumstances, they ought to be allowed to file a supplemental answer, for the purpose of placing these facts upon the pleadings; and *held*, also, that although the effect of such permission might be to enable the parties to set up a defence of the want of jurisdiction in the courts of this province, to interfere in the subject matter of the suit, still that was not any objection against it, but rather a reason why they should be permitted to file the supplemental answer.

Mr. Nanton and Mr. Mowat, for the appellants.

Mr. Esten, for the respondents.

Mr. Nanton, in reply.

The nature of the case, the arguments of counsel, and the authorities cited, sufficiently appear in the judgment of the court.

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ROBINSON, C. J.—The appellants complain of an order of his Honour the Vice-Chancellor, rescinding an order which he had before made, giving leave to the appellants and *John McKenzie*, who was a defendant with them in the court below, to file a supplemental answer for the purpose of introducing upon the pleadings certain facts, in order to shew that the transactions through which they are sought to be charged, took place chiefly in Lower Canada, where the appellants were and are domiciled, and where the testator whom they represent also was domiciled at the time of his death; and that they are, under the circumstances, only liable to be charged according to the laws of that country; and that in point of fact, those laws differ materially, in regard to the subject matter of this suit, from the laws of Upper Canada.

1847.

Torrance
v.
Crooks.

The effect of the Vice-Chancellor rescinding the order which he had once granted, and which had been drawn up and passed, but not entered, is to deny to the appellants an opportunity of thus amending their answer. Judgment.

The appeal does not turn upon any question of jurisdiction, but the subject could not fail to be adverted to upon the argument, and it was more or less discussed by the learned counsel on both sides.

We must suppose the respondents to assume, that on some ground or other the Court of Chancery in Upper Canada can exercise jurisdiction and give relief in all the matters of which they have complained, and so far as the cause has gone, the appellants have seemed not unwilling to concede that they may, and they have seemed to content themselves with maintaining, that in regard to their execution of the trust committed to them by their testator, the courts here, in proceeding to control them, must apply the law of Lower Canada, upon the principle of *lex loci*.

Without desiring to travel out of the subject matter of

1847. this appeal, I wish to be understood, that on whatever principles it may have been assumed that the Court of Chancery of Upper Canada, can exercise a jurisdiction in regard to all the matters stated in the bill, I am not of opinion that the standing orders of the court, which were referred to in the argument, (the 63rd and 164th, I think,) can at all affect the question. The whole object of those orders evidently is, to afford facility in bringing absent parties before the court, to answer in those cases over which the court can legally claim jurisdiction. It is not pretended by such orders to extend the jurisdiction of the court to any objects over which its control would not otherwise rightfully extend.

Torrance
v.
Crooks.

It could not have been designed to give them that effect; and if it had been, that end, it is plain, could not have been attained by them.

Judgment. If the jurisdiction had been called in question, or if the pleadings were such as necessarily to bring the point under the view of the court, then I conceive the decision of it would not have been affected by those orders, which could clearly not confer any new or enlarged jurisdiction. As the pleadings in their present shape do not state the case in such a manner as to call upon us to consider the question of jurisdiction, I shall say no more at this time upon it.

With regard to the point of practice raised by the appeal, I am of opinion that the first impression of his Honour the Vice-Chancellor was the correct one, and that he could and ought to have allowed the supplemental answer to be filed.

It is objected as one reason against it, that it would in effect be opening a way to the party to except to the jurisdiction, after he has acquiesced in it. But if that effect could follow, it would, I think, be no reason against it, but the contrary, in a case such as this is stated to be

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in the appellants' affidavits. When a party withdraws himself and his property from the country in which he has had transactions and incurred liabilities, and takes up his residence in England, we know the grounds upon which the courts of equity there, having him within their jurisdiction, and taking upon themselves *agere in personam*, compel him to do what good conscience requires. If they did not in such cases take cognisance of equitable claims transitory in their nature, there would frequently be no remedy, for the party may have left his own country expressly for the purpose of evading his liabilities.

1847.

Torrance
v.
Crooks

Without stopping to enquire into the distinctions which have been established as to the extent of the jurisdiction which may be so assumed, it is obvious that in cases of that nature, and in cases where the existence of peculiar local jurisdiction, in England, may occasion difficulty, the interests of justice are concerned in holding persons strictly to the necessity of excepting at the proper time, and in the proper manner; and if they do not, then to regard them as having waived all question, by their acquiescence.

Judgment.

But the proposed supplemental answer states a case of a different kind; and the question of jurisdiction, which, upon some points, at least, of the respondents' case, and the proposed answer, would seem capable of being raised, would be, whether the court is not asked to interfere, without any pretence whatever, in a matter of wholly foreign jurisdiction, not merely as regards the subject matter, but as regards the persons whom the court is desired to controul.

I refer now particularly to that part of the bill which prays relief, as it is sworn in the affidavits, against persons who have been always, and are now domiciled in Lower Canada, and prays relief against them in regard to an administration committed to them by the proper

1847. authority of that country, and exercised there upon assets within Lower Canada, and in execution of a will made there, and by a testator domiciled there at the time of his death.

Torrance.
v.
Crooks

Now, without saying whether such statements do or do not certainly shew a case in which the Court of Chancery of Upper Canada has no pretence for interfering, it is clear, I think, that there is nothing which a court of justice would more scrupulously avoid, than meddling in any case, of which it could truly be said, that all they might assume to do in it must be *ex-ram non judice*.

They would be helping no one effectively by such an interference, but might be creating confusion and difficulty, and no court would suffer itself to be driven with its eyes open into such a course; and it is therefore in my opinion no objection to the amendment which is asked, that it may lead to the ascertainment of such facts as might bring the jurisdiction in question; for if it is surmised that there is really an objection of this vital kind to the court interfering, the sooner it is brought into light and disposed of the better.

Judgment.

In *Penn v. Lord Baltimore*, (a) Lord *Hardwicke* observes, "a court of equity, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears." Upon this point of jurisdiction, I refer to *Roberdeau v. Rous*, (b) *Lord Cranstown v. Johnston*. (c)

I may be in error in this view of the subject, but I certainly consider that any doubts of such a nature as have been suggested respecting the jurisdiction, instead of being arguments against allowing the supplemental answer, should rather have weighed with the court to grant it, in order that it might see its true position in regard to jurisdiction without delay; and we ought, I think,

(a) 1 Ves. Senr. 446.

(c) 8 Ves. Jr. 182.

(b) 1 Atk. 548.

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Torrance.
v.
Crooks

With regard to the propriety of allowing the supplemental answer under the circumstances, I think both reason and authority are strongly in support of it.

The case has been very ably argued on both sides, and all the decisions cited that the industry of counsel could discover. The current of authority seems to me consistent in favour of allowing the supplemental answer, for the purpose for which it is desired here.

It is not the case of a defendant seeking to retract an admission, or to depart from a statement which he has made, and to substitute another for it, when it might be doubtful whether the first statement or the second was the true one. The application is not only before the hearing, but before evidence taken. Judgment.

The fact of foreign domicile, and the fact of what the law of Lower Canada is in regard to the rights and duties of executors, are neither of them points in which there is the slightest reason for apprehending that the appellants can deal unfairly with the respondents, or the court, in whatever statement they may make.

No one can read the pleadings as they stand, without feeling satisfied what the fact really is, in regard to the domicile of the testator, and of these appellants.

The extracts of correspondence spread out on the bill, and the various statements in it, shew plainly enough to the apprehension of any man, that the testator was living in Montreal for many years, and carrying on large business there up to the time of his death, and it is just as plain that the appellants have been also all domiciled there continuously.

1847.

Torrance
v.
Crooks.

There can be no imposition designed or attempted in respect to either point; it is no questionable fact that these defendants wish to place upon the record, the truth of which may be known only to themselves, or which they have it in their power to distort or give a false appearance to. And as regards the law of Lower Canada, there can be no misleading by the appellants on that point.

Judgment.

In this respect, this case before us differs from those in which the courts have refused the amendment. The cases of *Tidwell v. Bowyer*, (a) *Hewes v. Hewes*, (b) *Nail v. Punter*, (c) *Bell v. Dunmore*, (d) *Dagly v. Crump*, (e) *Fulton v. Gilmore*, (f) *Swallow v. Day*, (g) *Maggridge v. Hodgson*, (h) *Frankland v. Overend*, (i) all tend to support the application, the last mentioned case strongly, because it was after rule to pass publication, and the defendant had admitted the plaintiff's case in a point which, by ordinary diligence in enquiry, he could readily and certainly have ascertained, and yet he was allowed to amend his answer, and deny what he had admitted.

I have looked into all the cases referred to, and I have found nothing in addition to them worth citing.

I consider this case stronger in favour of the application than most of them.

The cases relied on upon the other side do not seem to me to be any of them such as should lead us to say that the application should have been refused; a reason for refusing is obvious in all of them, such as could not be truly urged here.

In *McDougall v. Purrier*, (j) the court refused the

(a) 7 Sim. 64.

(c) 4 Sim. 482.

(e) 1 Dick. 85.

(f) 9 Jurist, 1, confirmed on appeal, (1845, p. 265.)

(g) 9 Jur. 805.

(i) 9 Sim. 365.

(b) 4 Sim. 1.

(d) 7 Beav. 283.

(h) 2 Anst. 443.

(j) 4 Russ. 486.

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amendment, but it was at a much later stage of the proceedings. I conclude that the suit bound no greater interest than the right to the tithes for the term in respect to which they were claimed. If it could, it would have seemed more consistent with justice to have allowed the amendment, but it was a fair matter for the exercise of the Chancellor's discretion under the circumstances.

1847.

Torrance
v.
Crooks.

Wells v. Wood, (a) there the amendment was refused but the defendant wished to admit a fact he had denied, and he did not satisfactorily shew why he had made the former misstatement. The Lord Chancellor, however, stated the question to be always "one for the discretion of the court in the particular case."

Greenwood v. Atkinson, (b) where it was also refused, affords no argument against the amendment here, but the contrary; and the same, I think, may be said of *Spurrier v. Fitzgerald*, (c) and of *Curling v. the Marquis of Townsend*. (d)

The latter case was much relied on by the respondents, but it was decided partly because the defendant did not shew precisely what he desired to insert in the supplemental answer: his object, besides, was to retract admissions deliberately made; and the court gave as another reason, that the amendment could not materially alter what the court would do in the case.

Nevinson v. Stables, (e) when carefully examined, affords no ground for refusing this application. It was after final decree, and the party petitioned for a re-hearing, which the Chancellor said could only upon that evidence result in the same decree that had been made. If he could have any redress in that case, it could only

(a) 10 Ves. 401.

(c) 6 Ves. 654.

(e) 4 Russ. 210.

(b) 4 Sim. 54.

(d) 19 Ves. 628.

1847. be by a bill in the nature of a bill of review, for the purpose of admitting new facts.

*Torrans
v.
Crooks.*

The principles and purposes for which courts of law will allow parties to alter their pleadings, are in the main adhered to in courts of equity, and what was desired in *Nevinson v. Stables*, would, under corresponding circumstances, be denied at law.

But at law, before trial, and while no evidence has been heard, great facility is allowed to parties so to shape their pleadings as to attain the ends of justice in regard to the substantial points in the cause.

The case of *Huber v. Steiner*, (a) cited by Mr. Nanton, is a proof of this, and the language of Lord Chief Justice *Tindal* has a strong bearing here.

Judgment. In courts of equity, from the peculiar nature of the proceeding, the object being to allow a party in the cause to vary his own statements on oath, there will frequently occur reasons for caution which would not apply in in regard to amendments in the common law courts, but where there is no room under the circumstances for suspicion, the object in all the courts must be the same—to advance the ends of justice by allowing the case to rest on its real merits, and to be decided on its true grounds.

I have looked carefully into the late case of *Fulton v. Gilmore*, (b) cited by the respondents, and find nothing in it that has a strong bearing in their favour. The amendment there was allowed. The practice on this point was examined at some length, and authorities compared and considered.

The case, I think, on the whole, supports the amendment here, and is certainly not an authority to be relied on as decisive on the other side.

(a) 4 Moore & Scott, 328.

(b) 1 Phillips, 527.

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I do not indeed see how it could be expected, that a final decree could be made in this case without reference to the law of Lower Canada, and to the fact of foreign domicile, sufficiently apparent on the record (though not formally and precisely brought out) to call for attention and enquiry, unless we are to be reckless as to the bounds of our jurisdiction, and indifferent to the obligation incumbent upon the court to apply the right rule of law according to the facts of the case.

1847.

Torrance
v.
Crooks.

I refer to the case of *Pottinger v. Wightman*, (a) as shewing with what scrupulous care courts of equity feel it proper to proceed, in directing enquiry into such facts as are indispensable to be ascertained before they can be satisfied of the grounds on which they are to act. *Parken v. Wilby*, (b) and *McCall v. McCall*, (c) are in point to shew, when taken in connexion with the statements in these pleadings, that it must be incumbent upon the court to see all doubts cleared up as to what rule of law is to be applied by them in deciding between these parties.

Judgment.

The bill discloses plainly enough to common understanding, that the appellants are attempted to be called to account here in respect to a trust committed to them and executed by them in a foreign country, from which they have never departed, and to the laws of which they are amenable.

If that fact were at all doubtful upon the pleadings, it is fit it should be ascertained, or the court must be acting in the dark.

It has not been questioned that an appeal lies from such an order as this, though it is upon an application to amend, which in general is discretionary with the court, and is admitted to be clearly so in England in this particular instance.

(a) 3 Mer. 67.

(c) 2 C. & L. 184.

(b) 1 T. & R. 372.

1847.

Torrance
v.
Crooks.

It is against the general principle, to admit of appeals from the discretion of one judge or court to the discretion of another; but some of the cases cited shew that appeals have been entertained in England from orders made on applications of this nature, and we may safely assume the right of appeal to be at least as clear here.

I do not find, on a comparison of the answer as it now stands with the draft of the supplemental answer, that it is desired to introduce any thing more than seems necessary for fixing attention to the alleged facts of foreign domicile of the testator and of the appellants, and of the justice and necessity of applying the *lex loci*, which is averred to be different from the law of this province.

Judgment

It was urged that in the supplemental answer, the appellants would endeavour to excuse themselves under the law of Lower Canada for neglects and omissions which in their original answer they have denied, but I do not find that to be so when the two are closely compared.

On the whole, I think there are important and strong reasons for allowing the amendment, and I can see no objection against it. Under corresponding circumstances in a court of law, it would in such a stage of the cause be allowed at once.

There are many cases, and among them some of the most recent, in which the defendant has been allowed the indulgence when the circumstances were stronger against it; and I see none in which it has been refused, unless on some ground that does not exist here.

These appellants have applied in an early stage of the proceedings; they are not asking to be allowed to withdraw any admission made by them, or to deny any former statement, or to depart from any line of defence which

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Torrance
v.
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What they wish to place formally and distinctly on the record, is no matter of which a knowledge is confined to their own breasts, and upon which they can intend or expect to mislead the court by false information, or disingenuous concealment. And the points which the amendment would bring distinctly into view, are only points on which the court for its own sake would find it necessary, as I conceive, to see that all doubt was removed, before they could venture to make a final decree.

Let us suppose that the case had gone, as it stands upon the bill and answer, to the hearing, and that it had been clearly made out, that the appellants have employed in their own business large sums of money of the estate, for which they admit themselves to be under the circumstances accountable with interest; and suppose that the rate of interest in Lower Canada had been much higher than that of this province, or much lower, can we avoid seeing that the Vice-Chancellor would at once have had to determine according to which rate of interest the appellants should account, and that it would be inconsistent with the internal evidence in the bill as to the scene of these transactions, if he had assumed that it was according to the legal interest of Upper Canada that it should be computed, can we say that the Vice-Chancellor could have felt clear in giving such a direction? and yet this point of the rate of interest might be a very minor consideration, compared with some that might present themselves upon the hearing, and which ought to be disposed of on a proper application of the principle of *lex loci*, even admitting that it should proceed without any inevitable necessity arising for looking into the question of jurisdiction. Judgment.

It is plain to me, that what these appellants ask for,

1847. is nothing more than is most desirable should be granted on public grounds affecting the court, and with a view to preparing the way for a right determination of the case.

Torrance
v.
Crooks.

I am therefore of opinion, that the order appealed from should be reversed, and that the appellants should be allowed to file a supplemental answer, as they had been permitted to do by the second order, upon the terms of paying the costs which may be occasioned by the amendments, and the costs of the application.

MACAULAY, EX. C., concurred in the judgment given by the Chief Justice.

BOULTON, EX. C.—Not being aware that judgment would be particularly desired to day, I have not come prepared to express any decided opinion upon the case; but as the Chief Justice is ready to deliver his judgment, in which Mr. Justice *Macaulay* coincides,) I do not wish judgment postponed on my account.

Judgment.

I entertain no doubt but that the law of Lower Canada is the rule by which the executors, who reside in that part of the province, and where the testator lived and died, and where the chief part of the estate was to be administered, must be held to account; and the only point about which I entertain a doubt is, the mode of introducing that law to the notice of the court below. What the law of Lower Canada is, as applicable to the taking the accounts in this case, is a matter of fact to be made out in evidence; and it appears to me that it may be more conveniently done by reference to the master than to make it a question at the hearing. The defendants in the court below, might certainly have set up the domicile of the testator by their answers; but even then the law of that domicile would have been the subject of examination in the master's office, to govern the facts to be developed there, and to form the subject of his report.

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In *Pottinger v. Wightman*, (a) the decree directed an enquiry before the master, both as to the domicile of the intestate, and as to the law of Guernsey, where he was said to have lived and died. In *McCall v. McCall*, (b) a similar enquiry was directed, at the suggestion of the court. I do not mean to say, that upon further deliberation I might not have concurred in the opinion expressed by the Chief Justice, and acquiesced in by Mr. Justice *Macaulay*; at present, however, I incline to the opinion, that all that is sought for by the supplemental answer might as well be obtained by a reference to the master under the decree, and with less expense.

1847.

Torrance
v.
Crooks.

With regard to jurisdiction: as the defendants have chosen to appear, the court have, doubtless, full power to proceed to a final adjudication: how it can be enforced, if the parties to be acted upon are really resident in Lower Canada, beyond the jurisdiction of the court below, is another question, not now under consideration. Had the defendants refused to appear, I doubt very much the power of the Vice-Chancellor to have enforced their appearance.

Judgment.

With regard to the general jurisdiction of the Court of Chancery over matters arising abroad, it may safely be laid down that the principle upon which it rests, consists in its power of coercing or restraining the parties residing within its jurisdiction claiming interest in such foreign transactions. If the parties submit themselves to the jurisdiction of the court, by appearing to its process, they may undoubtedly be directed by the court as to the manner in which they shall deal with matters in which they are interested abroad. The subject is clearly, and I think most satisfactorily, though shortly treated, in *Lord Portarlington v. Soulby*. (c)

In this case, the parties having appeared, may be

(a) 8 Mer. 67.

(c) 8 Milne & Keene, 104.

(b) 2 Con. & Laws, 184.

1847.

Torrance
v.
Crooks.

directed to account for the estate of the testator, although every thing connected with it may have taken place in Lower Canada. In taking such account, the laws of Lower Canada must doubtless be the rule to guide the judgment of the court here. If, after having appeared, the defendants are no longer found in Upper Canada, no process from Chancery can affect them or their property abroad; and should they possess none here liable to sequestration, the decree will be abortive. If found here, the parties may be imprisoned until they comply with the behests of the court.

Mr. *Eaten* then asked for the costs of the appeal, as the granting permission to file a supplemental answer was a matter of indulgence on the part of the court: and whether or not the defendants in the court below would be allowed to avail themselves of the supplemental answer, for the purpose of raising any question as to the jurisdiction, they having in their original answer submitted to act as the court shall direct, and by their supplemental answer an attempt is made to do away with that submission and plead to the jurisdiction. The court reserved the consideration of the question of costs, and the following note on both points has since the argument been made by his Lordship the Chief Justice.

A discussion arose upon the course which it might be reasonable to take with regard to the costs of the appeal, the respondents' counsel suggesting that their costs of the appeal should, under the circumstances, be also paid as a condition of obtaining the order. The court said they had no objection to reserve the point for further consideration, but they did not think they could properly vary from the general course with regard to costs, when the decree or order appealed from is reversed.

That the court were not now granting an indulgence as upon the first application for it, but were affording relief against an order taking away the indulgence after

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it had been granted, and as the court now think, properly granted. The respondents it may be reasonably said, ought to have submitted to the order which the Vice-Chancellor had made. Their creating a new discussion about it was unnecessary, and it would be unreasonable to throw the respondents' costs of the appeal upon the appellants who had succeeded in the appeal.

1847.

Torrence
v.
Crooks.

Mr. Esten, on behalf of the respondents, requested that the court would intimate whether the appellants would be allowed to make use of the supplemental answer for the purpose of raising any exception to the jurisdiction which they could not have taken upon the pleadings as they before stood.

Per Cur.—We cannot anticipate what course the parties may imagine to be opened to them by the supplemental answer, nor what the court may think it right to do upon the pleadings as they will then stand, either in consequence of any question upon the point of jurisdiction that may be raised by the parties, or of their own suggestion.

Judgment.

The effect will be to place on record the facts of foreign domicile, and of the particular law of Lower Canada, and they will stand then as if they had been so stated in the original answer, though the original answer will remain on the files unaltered, according to the modern practice.

The appellants have not asked for the amendment for any other purpose than to open the way to them for contending that they are entitled to have the law of Lower Canada applied to the question, whether they have duly administered the estate or not.

If, however, they should hereafter object that the court has no jurisdiction over the case, and it would be an

1847. answer to such objection, that they have voluntarily appeared and answered in the suit, and thus submitted to the jurisdiction, (supposing the fact to be so,) then that answer to the objection would seem to be as available to the plaintiffs below after the supplemental answer as before. And however that may be, the facts of foreign domicile, and of the peculiar law of Lower Canada, if it does differ from that of Upper Canada in the particulars alleged, are too indispensable to the right adjudication of the case, to be left out of view.

Torrance
v.
Crooks.

Judgment.

STREET V. THE COMMERCIAL BANK OF MIDLAND
DISTRICT.

Mortgage—Priority—Registration.

Where a party held a mortgage upon lands, and the mortgagor having afterwards become indebted to the mortgagee in a further sum of money, conveyed the lands to him in fee, and some days afterwards the grantee gave the mortgagor a bond to re-convey upon payment of the whole debt. *Held*, that the grantee was entitled to hold the premises as a security for the whole of his debt, as against a mesne incumbrance which had been created thereon between the time of his obtaining the mortgage and the conveyance to him in fee, but of which he had not been notified before the execution of the conveyance under which he claimed. *Held, also*, that registration is not notice in this country.—[Grant's Ch. Rep. vol. 1, p. 169; but see stat. 13 & 14 Vic., ch. 63, sec. 4; Con. Stats. U. C. p. 894.]

HAWKINS V. JARVIS.

Practice—Pro confesso—75th order.

Held, per Cur., (Esten, V. C., dissentiente,) that the practice hitherto pursued in the Court of Chancery of confirming the master's report, when the account has been taken *ex parte*, and without notice to the defendant,

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is irregular; and that the court was right in refusing to confirm the report, notwithstanding that had been the practice ever since the order in question was made—[1 Grant's Ch. Rep. 257.] 1847.

Hawkins
v.
Jarvis.

THE HOME DISTRICT MUTUAL INSURANCE COMPANY V. THOMPSON.

[Before the Hon. J. B. Robinson, Chief Justice; the Hon. J. B. Macaulay, Ex. C.; the Hon. Mr. Justice McLean; the Hon. Mr. Justice Draper; and the Hon. Henry John Boulton, Ex. C.]

ON AN APPEAL FROM THE DECREE OF HIS HONOUR VICE-CHANCELLOR JAMES MON.

Mutual Insurance Company—Injunction—Company electing to re-build rather than pay insurance.

According to one of the conditions in a policy of insurance effected upon a dwelling house, the company in case of loss or damage thereto, were to have the option of making good such loss or damage either in money, according to the sum insured, or by re-building, or by repairing the same, according to the circumstances. The house having been destroyed by fire, the company instead of paying the amount insured, elected to re-build, which they commenced doing without having obtained any plan of the house destroyed from the insured, and against his express objection to their proceeding: in erecting the new structure they also intentionally departed from what was known to be a feature of the old building; thereupon the insured filed a bill to restrain the company from proceeding to erect the building in the defective manner pointed out; and praying that the company might be decreed specifically to perform the condition by erecting a house exactly, or at least substantially, corresponding with that destroyed. The Vice-Chancellor decreed the relief as prayed: from this decree the company appealed, and on argument thereof the court reversed the decree so pronounced, and dismissed the bill; but, under the circumstances, without costs.

The bill in the court below was filed by Charles Thompson against The Home District Mutual Insurance Company, praying under the circumstances therein set forth, and which are clearly stated in the judgment, for an injunction to restrain the company from proceeding with the re-building of a house which had been insured by them, and subsequently destroyed by fire; and also

Statement.

1847. for a specific performance of the condition embraced in the policy, giving the company a right to re-build, they having elected to take that course.

Home District Ins. Co. v. Thompson.

The court below having granted the relief prayed, the defendants appealed to this court.

Mr. Adam Wilson and Mr. Turner, for the appellants.

Mr. Esten and Mr. McDonald, for the respondent.

The judgment of the court was delivered by

ROBINSON, C. J.—This suit arises out of a contract of insurance against fire, made the 4th of April, 1845, upon a wooden building in the village of St. Albans, in the township of West Gwillimbury, owned by the respondent, and occupied by one *Winch*, his tenant, as a tavern. The sum assured on the building was £550. It was a condition of the policy that the interest of the assured should not be assigned without the consent of the company in writing; and that in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without consent, the policy should be thenceforth void: that a false description by the assured of the building or its contents, or an over-valuation, should render the policy absolutely void: that the company were not to be liable for any loss arising from the use of fire in buildings unprovided with good and substantial stone or brick chimneys: that the assured should within thirty days after any loss deliver a particular account of such loss or damage, signed with his hand, and verified by his oath, stating what was the whole value of the property insured; and that all fraud or false swearing should cause a forfeiture of all claim on the insurers, and should be a full bar to all remedies against the insurers, on the policy: that in case of loss or damage upon any real property, it should be optional with the company to pay or make good such loss or

Judgment.

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damage, either in money, according to the sum insured, 1847. *or by re-building such real property, or by repairing the same, according to the circumstances, and with all due diligence, without being held to make any compensation or indemnification to the assured for rent, or non-enjoyment of the premises. And that if any difference should arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference should be submitted to arbitrators mutually chosen, whose award should be conclusive.*

Home District Ins. Co.
v.
Thompson.

The insurance in this case was for three years ending the 4th of April, 1848.

On the 2nd of January, 1846, the respondent's house was destroyed by fire; and on his claiming the £550 assured by the policy, he was informed by the appellants that they had resolved to avail themselves of the option to re-build, which they had ascertained they could do, it seems, for £484 10s. Judgment.

They accordingly on the 3rd of March, 1846, contracted with two builders to re-build the house for that sum. On the 25th of March, 1846, the respondent applied, through his solicitor, for a copy of the plan, specifications, and dimensions of the intended building, in order that he might compare the same with those of the building destroyed, and point out any deficiency previous to its erection.

The appellants, it seems, communicated the specifications at a verbal interview; and on the 18th of April the respondent's solicitors referring to what passed at this conversation, expressed their disappointment that the appellants were persisting to carry on the building under the present specifications, and they then gave them notice in writing of various defects in the building which they were putting up, and that it was their intention to

1847. take immediate steps to compel the company to follow the plan of that which was destroyed.

Home Dis-
trict Ins. Co.
v.
Thompson.

The appellants then proposed that the respondent should appoint a competent person to act with another to be appointed by them, in examining the building then in progress, in order to be governed by such suggestions as the respondent might judge to be necessary for making the house equal in value to the one burnt.

The solicitors reply, declining that proposition, because they contended it would be improper and unsafe (as they had before stated) to erect the new house on the old cellar walls, which were left standing; and further, that the chimney should have been taken down; and they insisted that the timbers of the frame already put up were grossly insufficient, and that the house, as the work was then proceeding, could not be rendered substantially like the one burnt. The appellants were assured that if they were disposed to remove their frame, and construct a building substantially agreeing with the one destroyed, the respondent would gladly furnish them with the accurate measurement of the old building for their guidance.

Judgment.

On the 1st of May, 1846, the appellants offered to submit the matters in difference in relation to this policy, to arbitrators, to be chosen in accordance with the condition in the policy.

The respondent's solicitors answered that they could see nothing to arbitrate about; that they could not recommend to the respondent to accept the house which was being built, and could not advise him to refer to arbitration to settle the amount of his loss, from their building an inferior house, that would be useless to him; that if the appellants would build such a house as the one burnt, the respondent would gladly accept it, and that he was prepared to furnish the accurate dimensions; but

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that until the present contract was discontinued, they 1847.
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Home Dis-
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In the meantime, on the 27th of April, 1846, the respondent had filed a bill in Chancery, setting out his policy of assurance, averring his interest in the building, and its destruction by fire, and that the appellants had declared their option to re-build; and complaining that without giving fair notice to him, and without having obtained accurate specifications of the former house, they were proceeding to build one in its place, in every respect inferior to that insured, in no respect substantially corresponding with it, and wholly unsuited to the purposes for which the former house had been used. The bill then specifies a variety of imperfections in the new building, and prays "that the company having elected to re-build under the condition, may be decreed specifically to perform the said condition, by erecting upon the property a house exactly, or at least substantially, corresponding with the one insured, and may be restrained Judgment.
from allowing the defects pointed out to continue in the house which they were proceeding to put up."

An injunction was granted.

The appellants object in their answer, that the respondent being aware of a by-law of the appellants, (an incorporated company,) that not more than two-thirds of the value should be insured on any building, did falsely state in his proposal, that the sum which he desired to insure was not more than two-thirds of the value; that he did not within thirty days, as required by the policy, deliver in an account on his oath of the loss; that respondent had alienated or agreed to alienate the property between the time of effecting the policy, and the fire; and they maintained that all these are causes of forfeiture of all claim under the policy, and that they are not waived by the appellants offering to re-build. They then set forth the specifications of the house which they

1847.
 Home Dis-
 trict Ins. Co.
 v.
 Thompson.

were proceeding to re-build, and aver that if they were suffered to complete it, as they were proceeding to do, it would be a better house considerably than the one burnt.

They state their inability to put up a house corresponding in all respects with the one destroyed, as they have no exact description of it; that they will be liable to be perpetually impeded by objections on the ground of variances which would be founded on mere opinion; that they could not remedy what the respondent complains of as defects, without pulling down the house, and forfeiting their contract with the builders; and that the respondent's proper remedy is at law, for any damages he may claim by reason of any insufficiency in the new building.

Judgment. A good deal of evidence was taken in the case upon the state, condition and description of the old building, and of the new, and upon the points involved in the pleadings; and on the 8rd of February, 1848, the Vice-Chancellor determined that the appellants, under the conditions of the policy elected to re-build conformable to the said condition, and had therein made default; and that the appellants were bound specifically to perform the condition by re-building the house substantially corresponding with that destroyed, and by reinstating respondent therein within a reasonable time, with liberty to appellants to apply to the court in case of respondent refusing to afford them reasonable facilities for going on with the work; and with liberty to the respondent to apply in case of delay or otherwise, and decreed accordingly.

The injunction was continued, and it was referred to the master to set a value by way of occupation-rent to be paid by the appellants in consequence of the delay in re-building. The appellants to pay costs.

The defendants appealed against this decree, assign-

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ing many reasons, the principal ground being, that this is not a case in which a court of equity can, or rather in which it ought, according to the established course, in such cases, to entertain a suit for specific performance.

1847.

Home Dis-
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v.
Thompson.

Besides other objections in addition to this which I have already noticed, the appellants contend that the respondent is in strictness confined to the remedy by arbitration, under the terms of the policy; that moreover it appeared by the respondent's own evidence that the fire was occasioned by the defective state of the chimney, and the loss was therefore one for which according to an express condition in the policy the defendants were not to be liable; that the evidence also shewed that the respondent was aware both before and after obtaining the policy, that the house had more than once taken fire from that very defect in the chimney, and yet did not communicate the fact to the appellants; and that although the appellants not being aware of these facts could not rely upon them in their answer, yet when they came out on the respondent's own evidence, the court should be influenced by them in withholding their interposition, which is always discretionary, and should leave the respondent to his strict remedy at law; that the persons who have contracted with the appellants to put up the new building of which the defects are complained of, should have been made parties to this suit; that the appellants should not at any rate have been charged with an occupation-rent as provided by the decree, and should not have been made to pay costs; and that the Vice-Chancellor improperly rejected an affidavit made by the respondent, for the purpose of shewing his loss, and which the appellants offered in evidence in order to prove by it that the respondent had on oath affirmed £600 to be the *whole value of the property insured*, thereby in effect admitting that he had contravened the by-law on which the validity of his insurance depends; and which provides that no risk shall be taken of more than two-thirds the value of the property insured.

Judgment.

1847. The appellants in the argument relied on all these exceptions, which were largely discussed on both sides; but it is to no purpose for the court to consider them, until an opinion has been first formed on the main ground, which denies that there is any equity on the face of the respondent's bill; for if it be clear that the respondent should have been left to his remedy at law on the policy, that inevitably makes an end of the case here.

Hans Dis-
trict Ins. Co.
v.
Thompson.

Considering the nature of the policy, and of the risk insured against, it is an unfortunate and rather singular course which the appellants have pursued in declaring an option to re-build rather than to pay the sum insured. They have made it a regulation that they will not insure upon more than two-thirds of the value of any building; and it would seem rather inconsistent with that condition, that they should find it for their interest to re-build when there has been a total loss.

Judgment.

In case of partial damage only, it might be otherwise. This being a wooden building, partly on a foundation of wood, and very liable to decay, and the appellants being bound by the very terms of the policy to pay only the loss actually sustained (not exceeding £550) and not the loss according to the respondent's estimation of it, they could have gone to a jury upon the question of the actual value at the time of the fire, which it would seem would have given them all the protection they could desire.

By undertaking to re-build, according to the dimensions and arrangements of the old house, and to build a house, of course as sufficient in point of strength of frame and quality of materials as the other, they would seem to be binding themselves to give the respondent a new house of the same description, and on the plan of the one burnt, which had been in actual use for twelve or fourteen years, as a country tavern, subject of course to be greatly injured by the natural decay of the materials, and by the

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wear and tear arising from the nature of the occupation of it as a tavern. How the appellants could expect to do that, not only for less than the cost of building the former house, when it was new, but for less than its actual value, or two-thirds of its actual value, in its decayed state, fourteen years afterwards, it is not easy to understand.

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v.
Thompson.

The attempt to arrive at such a result was almost certain to give rise to litigation, and it has placed both parties in a situation, from which it seems impossible that either can escape without considerable loss.

The first question that occurs, is, could the appellants properly take such a course, and thus decline to pay the loss in money, and undertake to reinstate by re-building. It seems inconsistent with their by-law, by which they have provided that no insurance shall be effected on any building to the amount of more than two-thirds of the value, which provision the respondent also clearly had in view when he insured, as appears by his application. Judgment.

But what is more material in a legal point of view is, that the exercising an option to re-build seems to be at variance with the principle and provisions of the act incorporating the company. (a)

How can it be made compatible with the mode of proceeding to which the company is restricted by the 10, 12, 13, 14, 15 & 16th clauses of the statute, by which a simple method is provided for ascertaining the amount of actual loss sustained in each case, and a remedy is given to the assured for recovering it. We do not see how the deposit notes, of the insurers, which are given, with reference to what the company may be obliged to pay as the amount of the loss sustained, can be made use of for procuring funds for satisfying a collateral contract

(a) 6 Wm. IV., ch. 18.

1847. which the act gives the company no power to enter into; nor how the assessments which are authorised to be imposed for one purpose could be imposed for another.

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Thompson.

We should have to determine that such a use could be made of the statute, before we could support a decree which compels the company to incur the expense of re-building, and which would possibly throw upon them the necessity of pulling down the building now partly erected, and putting up another, and so of incurring an expense far beyond the amount insured, and in respect of which alone the promissory note of the insured was taken. One of my brothers has suggested this difficulty, which seems to me to have so much weight in it, that for my own part I should on that ground alone decline affirming the decree which has been made for specific performance of an undertaking to re-build, for by doing so we should be giving a sanction to this method of proceeding by the company, for which there is not only no warrant in the act, but the whole system of proceeding directed by the act seems inconsistent with it.

Judgment.

It might seem hard to the respondent that he should fail in his suit in equity because the appellants have pursued an unauthorised course in which he was nevertheless willing to have acquiesced, and would have abided by it, but the answer to that is, that he became a member of the company by his insurance, and as such equally bound with the other members to know and to adhere to all the provisions of the statute, by which, the 6th clause of the act declares, "he shall at all times be concluded and bound;" and that his being willing to abide by the company's option to re-build and anxious to hold them to it, cannot make it right for a court of equity to direct any thing to be done which would be in contravention of the statute, and which if done generally in other cases as well as in this, might tend to throw the affairs of this company into confusion.

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But though taking this view, we could probably not have brought ourselves to affirm the decree, if there had been no other ground of exception to it than this, yet we do not make this the only ground, nor the main ground of our judgment.

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Home Dis-
trict Ins. Co.
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We have considered the case on the footing on which it was argued, and we all concur in the opinion that the bill should have been dismissed on the broad ground that a court of equity could not properly compel the appellants to re-build.

I can see nothing in this case to distinguish it from those in which the Court of Chancery in England has constantly declined to make such a decree. If the appellants had at once paid the sum insured, and the respondent had thereupon contracted with a builder to erect a house substantially like the one burnt, the inconvenience would have been the same to him as it is now, if the builder had either done nothing, or had proceeded to build a house inferior to, or of a different description from the one he engaged to build, and yet it is plain that a court of equity would not have entertained a bill for specific performance in that case. They would have left the respondent to sue upon his contract, and if he must have a building such as he contracted for, they would have told him that he could erect it himself, and recover damages against the contractor for breach of his agreement. The inconveniences of a court of equity taking upon itself to see a contract of that kind literally carried into effect are so obvious that they have in England always declined undertaking it, except under very special circumstances, and have left the party to his action at law, which in such cases is doubtless the best remedy.

Judgment.

I find no case that would warrant this decree. From the terms of it, I suppose, it was probably made upon the authority of *Storer v. The Great Western Railway*

1847. *Company*, (a) but that case was one of a very few in which from particular circumstances the court felt compelled to entertain the bill, because it was evident a court of law could give no adequate redress. *Franklyn v. Tuton* (b) is another, where the reason is equally obvious.

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trict Ins. Co.
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Wherever this point is treated of, the same six or seven cases are collected and reviewed, in which the Court of Chancery has either decreed or refused to decree specific performance of an agreement to build. I refer to Fonblanque's Treatise on Equity, B. 1, ch. 3, sec. 9, note: 3 Swanston, 137, note; 2 Eden, 128, note; and to the Treatise of Mr. Jeremy on Equity Jurisdiction; also the *City of London v. Nash*. (c) I have not found the relief granted in any case except under circumstances which make such case clearly an exception to the acknowledged general rule, upon strong and particular grounds, and there is nothing that I can see in the present case to afford any such ground.

Judgment.

It can neither be said that the remedy at law would not be adequate, nor that the building to be put up is so clearly and precisely defined that there could be no difficulty in enforcing exact performance.

The statute 6 Wm. IV. gives power expressly to the insured to bring his action at law against the company, for the loss or damage sustained, so that upon that point there can be no doubt, and if we should concede that because the appellants declared they would re-build, they were therefore bound to re-build, and could not at their pleasure retract and pay the money, still the question would present itself, had the respondent the right of action for not re-building? If he had not, that would, on general principles, be a reason for refusing to decree

(a) 2 Y. & Col. 48.

(b) 5 Mad. 489.

(c) 1 Ves. Sr. 12, and the note to Vesey's Supplement, page 15.

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specific performance, for it has been held (with some exceptions) to be a rule, that the defendant must have legally bound himself to do that, which the plaintiff desires to have specifically performed.

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If on the other hand the respondent could have brought an action to recover damages for not re-building, then he had that plain, complete and adequate remedy at law which renders it unnecessary that he should go into equity, for a wrong which damages would fully compensate, and which no court without extreme inconvenience could undertake in any other way to redress.

Building agreements and contracts to do work of various kinds, such as clearing lands, making roads and other personal acts of that kind, are matters of daily occurrence, and the absence of suits to compel their specific performance, when we know that the parties in innumerable instances disagree about the execution of them, is of itself conclusive against this suit. The course I take to be clearly against suing in equity, unless under some peculiar circumstances, which furnish an evident reason for such interference: as where a building is intended to form part of a row or square, and the contractor by persisting obstinately to build in disregard of the agreement, would spoil the main design, and injure other property; or when, as in *Storer v. The Great Western Railway Company*, the party could not by building himself procure that convenience for which he had stipulated, and which was necessary to the enjoyment of his property. There is nothing of this kind here. The tavern to be built is an isolated building; there is merely the disadvantage which there must be in all such cases, of the house being built different from the plan, or not being built well. Then as to the requisite of some thing precise and definite to work by, the case does not shew any thing that could be taken as a guide, and which the court could compel the appellants to work by. The evidence indeed establishes that there is no such undisputed

judgment.

1847. plan in existence; the house is no longer to be seen, and no plan of it has been preserved. If the appellants were to be compelled to go on, the very next thing they might do might raise a question of some imputed variance which could only be determined by the recollection of witnesses, who would probably differ in their statements.

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trict Ins. Co.
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Thompson.

Neither these mutual insurance companies nor the condition of an option to re-build, are new inventions, as we see by the case of the *Sadler's Company v. Babcock*, (a) and yet we can find no instance of such a suit in equity as the present.

Judgment. The policy only binds the appellants to pay £550 in case of loss, or rather to pay the actual loss, not exceeding that sum; the option to re-build is a privilege which they claim, and when they made that option, all that we can say is, that they were to proceed at their option to reinstate the assured without unnecessary delay, in a house as good and substantially the same as the one destroyed. If they trifled with him by not duly re-building, then the offer to re-build not faithfully acted upon, can never obstruct his remedy for his money, the payment of which is all he had any right to suppose he could compel when he insured his property. For delay in paying the money the law would clearly give redress, and by the terms of the statute the insured must wait six months after obtaining judgment before he can take out execution; there had been therefore no extraordinary delay when the respondent filed his bill. The placing a house upon the respondent's land not quite so good, or not quite like the one burned, can hardly be a positive damage, in addition to the delay in paying the money, for a wooden house in a village can without difficulty be sold, and the building removed; and if the leaving it there were actually a damage to the party beyond the value of the materials there can be no doubt that the law would afford an adequate remedy for such an injury.

(a) 2 Atk. 554.

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It is shewn that the appellants have expended £200 or more on the house as it now stands. If this decree should be enforced, then according to the respondent's witnesses, the house must be pulled down and another built up from the foundation. Mr. *Kemp* says: "If I had to re-build the house, I would not go on with the present frame; I do not think it safe; I do not think it would stand." *Crocker* says: "I would not finish the building: I consider it unfit for a tavern; I would not take it off any person's hands." It is unfit, he says, to be finished.

1847.
Home Dis-
trict Ins. Co.
v.
Thompson.

If this be true, and there is much in the evidence to shew, that the building could not be made in all respects like the former without taking to pieces all that has been done, then the effect of the decree might be to compel the appellants to sink all or the greater part of what has been already spent, and to spend many hundreds of pounds more, in attempting to build another house under the direction of the Court of Chancery, which shall correspond with the house burned, of which former house we have no certain description.

Judgment.

If there was an exact and complete specification of the building to be put up, and if the appellants had covenanted to erect such an one, still the weight of authority would be against entertaining the bill; but as it is, I consider it out of the question that this course can be taken.

Contracts of insurance are *strictissimi juris*, and the usual course is to leave parties to the legal consequence of their undertakings. I see instances in which the Court of Chancery has been resorted to for compelling policies to be given up, in some cases where fraud has been practised; and for compelling discovery with a view to protecting parties against fraud; but no instance in which a bill has been filed to compel a party to keep the engagement to which he is bound by his policy, or by any express legal undertaking subsidiary to it; and it is

1847. peculiarly proper that the parties should be left to their legal remedies, when, as in this case, exceptions are urged to the claim of the insured on several grounds, deduced from the terms and conditions of the policy, and the alleged conduct of the insured.

*Horns Dis-
trict Ins. Co.
v.
Thompson.*

If the appellants having proceeded as far as they have in the work, had themselves discovered some fatal variance in the plan, or some defect in the construction, and feeling that they could not safely proceed, had stayed their hand, I do not think that they could have been forced either to finish the house or take it down and build another. The consequence, I think, would be that they would be liable to pay the insured as much at least as if they had done nothing, and must take their chance of getting any thing for their building, if compulsion must be resorted to.

Judgment. The proper remedy, and the only one, seems to be, by an action on the policy, but it appears to be very desirable that the parties should come to an amicable compromise; for judging from the evidence it would be most imprudent for the appellants to complete the present building, and more equitable and advantageous for both parties, perhaps, that the building should be valued, and that the respondent should take the difference between that and the damage he is entitled to for his loss, and finish the house as he pleases.

Several questions were raised in the argument, which it is not necessary to decide, considering the view we take of the principal question. There can be no doubt that if the evidence shewed that the respondent had allowed the appellants to go on with the house for any considerable time, apparently acquiescing, he could, not after such delay and acquiescence, go and apply for an injunction. The cases which Mr. *Turner* cited on the point are strong and very reasonable; but here the appellants

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seem to have proceeded all along with a knowledge that the respondent was objecting and protesting, and requiring them to stop till he had seen and sanctioned their plans. So that there would not be a clear objection on that ground. The other objection, that it came out on the respondent's own evidence, and was then first known to the defendants that the chimney was unsound and unsafe, and had endangered the house before and after the insurance, to the knowledge of the respondent, and that the loss of the house at last was owing most probably to that very defect; that objection, I at present think, would have made it proper to withhold the decree that was made, at least until the fact had been enquired into; but my opinion and the judgment of this court proceeds upon the ground that though it may not be beyond the power it is against the course of equity to enforce an agreement to build unless where the description is more definite and certainly pointed out, than in this case, and unless also there should be some particular reason, such as we do not find in this evidence, for holding that the party claiming cannot be compensated in damages for the alleged non-performance.

1847.

Home District Ins. Co.
v.
Thompson.

Judgment.

We think the injunction should have been dissolved by his Honour the Vice-Chancellor, and the bill dismissed. Whether with costs or not is a matter to be considered. My own inclination is, that the respondent having brought the appellants into equity upon a case in which equity could not grant the relief prayed, consistently with those general principles which govern their proceedings, he ought to pay the appellants their costs of opposing his bill; but there is great force in the circumstances that the appellants improperly departed from the terms of their legislative charter, in undertaking to re-build rather than pay the sum insured; that they undertook to re-build without adequate means of knowing the precise description of house which it would be necessary for them to put up; that they persisted, though early warned, in a course which was certain to lead to difficulty, and that they

1847. ventured intentionally and expressly to depart from what was known to be a feature in the old building without the assent of the insured. These facts, it may be urged, fairly exposed them to whatever remedy the respondent could find open to him for stopping their proceedings; and that although he may have mistaken his proper remedy, it will be sufficient if he is left to pay his own costs of his fruitless proceedings, and that the appellants may be justly left to pay their costs of their defence. (a) I have no doubt that the court may in their discretion act upon this view of what is equitable under the circumstances. I apprehend it would be more in accordance with the course usually taken to dismiss the bill with costs, when it is dismissed upon such grounds as we are acting upon in the present case, but as all my brothers, I understand, are of opinion that the bill should merely be dismissed (that is without costs) our judgment is to that effect.

Judgment.

The judgment of the court is, that the decrees of His Honour the Vice-Chancellor be reversed, and the bill dismissed without costs.

(a) VanCouver v. Bliss, 11 Ves. 468.

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1858.

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[Before the Hon. Sir J. B. Robinson, Bart., Chief Justice; the Hon. W. H. Draper, C. J., C. P.; the Hon. Sir J. B. Macaulay; the Hon. Mr. Justice Burns; the Hon. Vice-Cancellor Spragge; the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]

[ON AN APPEAL FROM THE COURT OF CHANCERY.]

STANTON V. MCKINLAY.

Mortgage—Sale with right to re-purchase—11th clause of Chancery Act.

In November, 1834, the owner of land conveyed the same in fee for the consideration of £159 12s. 6d., with a proviso that if the grantor during his natural life, or his heirs, &c., in one year after his decease, should pay that sum and interest to the grantee, his heirs, executors, &c., the conveyance and every thing therein contained should be null and void. In August, 1835, the grantor died without having ever paid any portion of the principal or interest, and his representatives had never paid any portion thereof. Some time between 1841 and 1842 the grantee offered the heir-at-law of the grantor to re-convey on payment of principal and interest then due, (£225,) but which offer he declined to accept, stating that the land was not worth that sum, and subsequently went to reside in the United States, where he died, having some time previously to his death conveyed all his interest in the land to W. M., who died in 1849, without ever having registered his conveyance, or made any claim to the property, or seeking to redeem it. In 1856 the heir of W. M., a minor, filed a bill to redeem against the grantee, and his vendee of the estate, and which the vendee had been in possession of since the time of his purchase, and cleared seventy acres, and made other improvements to the value of about £600 or £700. On appeal this court, reversing the decree of the court below, refused the relief asked, and dismissed the plaintiff's bill with costs.

The bill in the court below was filed by William McKinlay, an infant, by his next friend, against George Stanton and Robert Christie, praying, under the circumstances therein stated, and which are fully set forth in the judgment of the court, that the plaintiff might be let in to redeem the premises in question, upon payment to the defendants of what, upon taking the accounts, should be found due to the defendants. On the cause coming on to be heard upon the pleadings and evidence before the Chancellor [Blake] and the two Vice-Chancellors,

Statement.

1859. the court, [SPRAGGE, V. C., dissenting.] made a decree
 as prayed, but charging the plaintiff with improve-
 ments.

Stanton
 v.
 McKinlay.

From this decree the defendants appealed for the reasons following:

1. Because the time limited by the indenture of 21st November, 1834, was of the essence of the contract, and no redemption was sought within that period.

2. Because the circumstances of this case are such, that a decree for redemption would work injustice, and that under the act for establishing the Court of Chancery, the plaintiff is not entitled to a decree for redemption.

3. Because the right or equity of redemption was abandoned by *Peter Vanevery*, in the pleadings named,
 Statement. through whom the plaintiff claims.

4. Because the conveyance from the said *Peter Vanevery* to *William McKinlay*, in the pleadings named, was void for maintenance and champerty.

In support of the decree the respondents assigned as reasons:

1. That no such irregularity or error had occurred in the proceedings in the cause, as to entitle the appellants or either of them to reverse the said decree.

2. That the respondent is entitled to redeem the mortgaged premises in the pleadings mentioned, as in and by the decree declared, and that it would be inequitable under the circumstances of this case to afford the said appellants any relief against the said decree by reversing or varying the same.

On the appeal coming on for hearing,

Mr. *Roaf* appeared for the appellants.

Mr. *McDonald* and Mr. *Barrett*, for respondent.

1858.

Stanton
v.
McKinlay.

SIR J. B. ROBINSON, BART.—This is a redemption suit for one hundred acres of land, in the township of Flamboro' West, north-half of one, in third concession. The defendant *Stanton* is the alleged mortgagee; and the defendant *Christie* is in possession of the property, having purchased from *Stanton* as the absolute owner of the fee, paying him, as it appears, the full value of the land, and having made large improvements since his purchase.

The Court of Chancery decreed redemption, on payment of the debt and interest; and also charging the plaintiff with the value of all permanent improvements made upon the land.

The defendants have appealed against the decree, contending that the plaintiff should not have been admitted to redeem.

Judgment.

The deed to *Stanton* was made on the 21st November, 1834, by one *Andrew Vanevery*, who then owned the land. It is a conveyance of the fee for the consideration of £159 12s. 6d., acknowledged to have been paid to the grantor by the grantee: there are no recitals, and the deed is in the common form of a bargain and sale; but it contains the following proviso, viz.: "That if the said *Andrew Vanevery*, during his natural life, shall pay, or cause to be paid, to the said *George Stanton*, his heirs, executors, administrators, and assigns, the sum of one hundred and fifty-nine pounds twelve shillings and sixpence, with interest; then, and in that case these presents and every thing herein contained shall cease, determine, and be null and void: and if the said *Andrew Vanevery* during his natural life, as aforesaid, should not pay, or cause to be paid to the said *George Stanton*,

1868. ^{Stanton} his heirs, executors, administrators, or assigns, the said ^{McKinlay.} sum of one hundred and fifty-nine pounds twelve shillings and sixpence; if the heirs, executors, or administrators of the said *Andrew Vanevery* shall in one year from the time of his demise pay, or cause to be paid to the said *George Stanton*, his heirs, executors, administrators or assigns, the aforesaid sum of one hundred and fifty-nine pounds twelve shillings and sixpence, with interest, then these presents, and every thing herein contained shall be null and void, any thing therein contained to the contrary notwithstanding."

Andrew Vanevery died on the 1st of August, 1835, having paid nothing; and neither his heirs, executors, nor administrators have paid any part of the principal or interest mentioned in the deed.

Peter Vanevery, the eldest son and heir of *Andrew*
Judgment. *Vanevery*, was in the provincial penitentiary, under sentence for some crime of which he had been convicted after his father's death, either in the same, or the following year. While he was imprisoned one *Muirhead*, to whom *Stanton* had given a lease of the property, brought an action of ejectment against one *Tulloch*, who was in possession; whether as a trespasser, or as holding from *Andrew Vanevery*, or from any one claiming under him, does not appear from the evidence. Judgment was recovered in December, 1836, and possession given to the plaintiff in ejectment under a writ of *habere facias*. In 1841 the heir of *Andrew Vanevery* returned to *Flamboro'*, his term of imprisonment having expired, and the defendant—though the time mentioned in the mortgage had expired five years before—agreed to let him have the land if he would pay the £159 12s. 6d., with interest, which came then to about £225. The evidence is not precise as to the time when this offer was made to him. Two of his sisters were examined as witnesses in the suit, one of them being called on the part of the plaintiff, and the other, called by the defendants,

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and according to their account it must have been some time between 1841 and 1845 that this offer was made to *Peter Vanevery*. When he found the amount that he would have to pay he said that the land was not worth it, and declined to take it. He afterwards left Canada, and went to live in the United States, and died there, having at some time before his death made a conveyance of all his estate and interest in this land to *William McKinlay*, father of the plaintiff in this suit, by a deed dated 23rd of May, 1848, for a consideration expressed therein of £100.

1858.

Stanton
v.
McKinlay.

William McKinlay died in 1849, having never registered his conveyance, nor ever, as the defendant *Stanton* swears, made any claim to the property, or sought to redeem it.

This bill to redeem was filed by *McKinlay's* heir, a minor, in 1856, and the defendant *Stanton* being called as a witness by the plaintiff, swore that he never heard till lately before the bill was filed, of the deed made to *McKinlay*.

Judgment.

In the meantime *Stanton* having continued in possession of the property since 1836, sold the one hundred acres which were at that time in a wholly unimproved state, to the defendant *Christie*, on the 24th of October, 1851, for £407 10s., which was paid part down, and the residue, £272, in two equal instalments, with interest, in November, 1852, and November, 1853. *Christie* entered into possession of the property immediately upon his purchase, has cleared seventy acres of the land, and made improvements in all to the value of from £600 to £700. A witness who has lived long in that part of the country, and is a surveyor, swore that the land in 1837 was not worth more than 20s. an acre, which would shew it to have been not worth nearly as much as the £159 12s. 6d. at the time it was conveyed to Mr. *Stanton* in 1834. At present it is worth, in the

1858. opinion of that witness, about £5 an acre, exclusive of the improvements made upon it.

Stanton
v.
McKinlay.

It did not appear to be known to the family of *Andrew Vanevery* that *McKinlay* had obtained a deed from *Peter Vanevery*, until a short time before *McKinlay* died, though that was some years after the date of the deed. And when he was told by two of *Vanevery's* daughters that he had done a foolish thing, his answer was, that if he should lose the suit which he talked of bringing against the defendant *Stanton*, it would be no loss to him, as *Peter Vanevery* had furnished him with the means of carrying it on.

Judgment. This was the substance of the evidence: whether the deed made by *Andrew Vanevery* to the defendant *Stanton*, in November, 1834, should be looked upon as a mortgage or a conveyance with liberty to re-purchase, it is clear that the estate had become absolute at law in the defendant *Stanton* in August, 1836, after one year had elapsed from the death of *Andrew Vanevery*. The 11th clause, therefore, of the 7th Wm. IV., ch. 2, applies to this case, and admitting the deed to be a mortgage, as the plaintiff assumes it to be, that clause gave power to the court below to deal with the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators, or assigns, as might appear just and reasonable under all the circumstances of the case.

The exercise of that large discretion, however, was made subject to appeal, and we are called upon to say whether we think the order that has been made is just and reasonable under the circumstances.

It cannot be said that the reasons which are set forth in the statute 7 Wm. IV., ch. 2, as having led to the insertion of the 11th clause, apply with much force in this case, for only a few months elapsed between the estate becoming absolute at law in *Stanton*, in August,

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1836, and the passing of the statute in March, 1837, 1859.
 which as soon as the Court of Chancery was organised
 under it, gave to *Stanton* the same remedy for foreclos-
 ing (if that was necessary to his interests from the
 nature of the transaction) that a mortgagee has now, or
 had at any time in England; he cannot therefore be said
 to have suffered any particular disadvantage as mort-
 gagee, from the want of an equitable jurisdiction, since
 he could hardly have foreclosed under any circumstances
 before March, 1837, and the jurisdiction was provided
 early enough for his purpose. If this was a case, there-
 fore, in which redemption would as a matter of course be
 decreed in England as upon a mortgage, it would be
 proper, I think, to make the same order here, unless we
 should be satisfied that a court in England, while allow-
 ing redemption in such a case, would do it reluctantly,
 under the pressure of a necessity of abiding by decided
 cases, and with the conviction that the general rules
 established by their practice would operate unjustly or
 harshly in the particular case. Judgment.

If this should appear to be a case of that description,
 then the 11th clause, which was so much discussed in
 the case of *Simpson v. Smyth*, (a) in this court, enables us
 to deal with it more at large than the Court of Chancery
 in England could deal with a similar case, and having
 a discretion clearly given to us to grant or to withhold
 redemption, we need not throw upon the defendants any
 injustice or hardship which we think could be avoided
 without leaving the plaintiff to suffer as great or greater
 injustice.

So many years have now elapsed since provision was
 made in the act of 1837 for the exceptional class of cases,
 that it is probable that there will be few if any more
 occasions for exercising the discretion given by that
 statute. And indeed, I look upon this as a case in
 which such a course as may appear to be just can well
 be taken without the aid of that statute.

(a) Ante pp. 9, 172.

1558.

Stanton
v.
McKinlay.

Judgment.

It is so much out of the common course for a creditor to give his debtor the whole of his life-time to pay his debt, and without exacting any interest to be paid in the meantime, or taking from him an express agreement to pay the principal sum at any time, that it hardly looked like a transaction of business, though the broken sum of £159 12s. 6d., mentioned in *Vanevery's* deed, would seem to have been founded upon some calculation growing out of an actual transaction of some kind which has not been elicited in the evidence. The explanation given on the argument before us was, that *Stanton* had married a daughter of *Andrew Vanevery*; that the 100 acres of land had been mortgaged by *Vanevery* to some other person; and that *Vanevery* being unable to redeem it, it was agreed between them, that if *Stanton* paid off the mortgage, *Vanevery* would give him a deed of the land, and that if he should re-pay *Stanton* at any time while he lived, with interest; or if his heirs or personal representatives should pay it within a year after his death, the land should be given back. This statement seemed to be acquiesced in by the other side, and if true, it accounts naturally for what was done. If *Vanevery* was not able to redeem the land, and his son-in-law was, and this at a time when there were no means of enforcing an equity of redemption, unless when the mortgagor was in possession, and the mortgagee was driven to an ejectment, it might naturally suggest itself that rather than let this land be lost to the family, which might increase much in value with time, it would be well that *Stanton* should pay off the debt, and save the land; and for all we can tell, the privilege of getting back the land from him by paying him back his money advanced, with interest, at any time during *Vanevery's* life, or within a year after his decease, may have been a privilege voluntarily afforded by *Stanton* in favour of *Vanevery*, when he would have been unwilling to interpose in order to save the land for any one but *Vanevery*, or his heir or devisee. The allowing a year beyond his death was a reasonable concession, because he might have died sud-

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denly without redeeming, although he might have resolved to do so, and made provision for it, and the giving a year would afford time to carry into effect any such arrangement.

1858.

Stanton
v. 153
McKinlay.

We have no question here about the reception of parol evidence, or of a deed or writing executed subsequent to the conveyance made to the plaintiff. The deed itself discloses the case, and shews the estate not to have been conveyed absolutely, but subject to condition; and, saying nothing at present of the statute 7 Wm. IV., ch. 2, the question is, whether it is most reasonable to look upon the proviso in the deed as constituting a mortgage with all its ordinary consequences, or as conferring a privilege to re-purchase within a certain time. The case nearest to the present in its circumstances, is that cited of *Newcomb v. Bonham*, (a) of which the facts are more particularly stated in the report by *Freeman*. (b) There the deed was absolute on the face of it, but by another deed executed at the same time the grantee covenanted that he would re-convey the land if the grantor should re-pay the consideration money—£1,000—with interest during his life-time. It would make no difference in the view of a court of equity that the covenant to re-convey was given in a separate instrument executed at the same time. All would be looked upon as one transaction, as much as if such an engagement to re-convey had appeared in the same deed. After the death of the grantor, who had not availed himself of the privilege given by the second deed, the heir applied to redeem, and the Lord Chancellor decreed redemption, which *Freeman* observes was thought hard at the bar, because the second deed contained an express declaration that if *Newcomb* did not pay the £1,000 in his life, neither his heir, nor any person after him should have any equity of redemption. The case was afterwards re-heard, however, before the Lord Keeper, who held that there

Judgment

(a) 1st Vern. 7, 214, 232.

(b) 2 Free. 67.

1858. should be no redemption, and dismissed the bill; and
 Stanton *V.* *Ventris* adds, in a note to his report of the case, (a) that
 McKisley. the judgment of the Lord Keeper dismissing the bill was
 afterwards affirmed in parliament.

There were circumstances in that case in favour of the holder of the estate, which do not exist in the present case; and, on the other hand, there are circumstances peculiar to this case, which make strongly against the right to redeem.

I think nothing in a court of equity would turn upon the fact of there being negative words used in *Newcomb v. Bonham*, declaring that unless *Newcomb* should pay the £1000 in his life-time there should be no redemption, for wherever there would clearly be a clear equity of redemption without these words no attention is paid to them in equity.

Judgment.

The case of *Floyer v. Lavington* (b) was one similar to the present in its main features, for there, as well as here, the party conveying a rent-charge was to have it back in case he should re-pay the consideration, with interest, at any time during his life-time. The heir sought to redeem the rent-charge. The condition for redemption was, as in this case before us, contained in the same deed which transferred the rent-charge, and it was insisted that it was a plain mortgage; that the clause restricting the redemption to the life of the mortgagor was of no force, for that an estate once redeemable can not be rendered irredeemable by any words or agreement made at the same time.

There a very long time had elapsed before any effort was made to redeem, much longer than in the case before us, and there were several other circumstances which were peculiar to the case. The Lord Chancellor would not allow redemption, saying that several circumstances

(a) 2 Ventris, 364.

(b) 1 P. Wms. 268.

1858.

Stanton
v.
McKinlay.

concurred which, though each of them singly might not be of force to bar the redemption, yet, all of them together were strong enough to prevail over it; and he remarked that the mortgagee seemed to have allowed a consideration for the purchasing the equity of redemption after the death of the mortgagor, and he specified several circumstances to the disadvantage of the mortgagee in the transaction, which seemed to render it reasonable that he should stipulate for holding the mortgage discharged from any equitable right if the mortgagor should not choose to redeem during his life-time. He noticed that the mortgagor was not bound to pay the money by any covenant; but the mortgagee had merely left it at his option whether he would redeem or not; and that there could be no reason given why such a contingent right of redemption might not upon fair and reasonable terms be purchased.

So in the present case, if this had been a mortgage given to secure a pre-existing debt, we should have found in it some express covenant to pay the debt, and to pay the interest half-yearly, or yearly, and so, also, if *Stanton* had lent the money to enable *Vanevery* to pay the mortgage, and was looking for re-payment. According to all the evidence no one would have regarded the 100 acres of land in 1834 as good security for a debt of £159, to say nothing of accruing interest, for it was not at the time worth nearly the amount, though any one might have taken it as security for a pre-existing debt, so far as it would go. But the defendant, rather than *Vanevery* should lose the land, and it should be gone altogether, without the chance of benefit to either of them, from a probable rise in value, as the country around it should become cleared, and people might be willing to run the risk of paying off the old mortgage, took the place of *Stanton* as owner of the land, upon the understanding that if neither *Vanevery* nor his executors should redeem the land till a year had elapsed after the death of *Vanevery*, then the land should be absolutely his.

Judgment.

1858.

Stanton
McKinnlay.

Properly speaking, there was no debt or loan in the case. *Vanevery* did not become a debtor to *Stanton* by the transaction; but had merely an option reserved to him which he did not exercise.

Judgment.

We should lay little stress, I think, upon the ejectment, because *Peter Vanevery* was then a prisoner in close custody, and may have heard nothing of the suit before judgment, though, if it be true, as the witnesses state, that he was imprisoned under sentence for a long term, the probability is that his attainder was for some felony, which may have induced a forfeiture. But at any rate he regained his liberty, while the lot was yet unimproved; and a considerable time after the estate had become absolute at law, he was told that he might still have back the land, if he would re-pay the money with interest, which *Stanton* had given for it. He refused this, not asking for the indulgence of further time, but upon the consideration that the land was not worth as much as he would have to pay. That surely, looking at the nature of the transaction, well warranted *Stanton* in looking upon the property as absolutely his, and dealing with it eight or nine years afterwards as if he were the owner, by selling it to a *bond fide* purchaser for value. I should have hesitated to allow *Peter Vanevery* himself to come so many years afterwards to redeem against *Stanton*, if he had gone in the meantime into possession of the land, and made large improvements. And the claim for redemption comes under no more favourable circumstances, when it is advanced by the heir of a person who took a conveyance of *Peter Vanevery's* right, which he seemed always to have kept secret, though he lived several years afterwards, and when there is much reason to doubt from the evidence whether he gave any consideration whatever for what he now advances as his equity of redemption.

If it were a clear equity of redemption, it would not signify how easy the terms were on which he obtained

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it; but in such a case as this is, the apparent nature of the assignment as between *Peter Vanevery* and *William McKinlay*, his brother-in-law, is a circumstance to which some weight, I think, may properly be given. According to the evidence, *Christie*, who gave £407 10s. for the land, has expended £600 or, more upon it, and it has long been his home. It would be hard and unjust, I think, that he should be made to give way to *McKinlay's* heir, claiming under an assignment of such a nature, made by *Peter Vanevery*, after he had deliberately waived his privilege of redeeming, or, as I think it more just to call it under the facts of this case, had renounced the privilege of re-purchasing.

1558.
Stanton
McKinlay.

Besides the cases I have mentioned, I refer to *Miller v. Lees*, (a) *Howard v. Harris*, (b) *Nicholson v. Hooper*, (c) and *Williams v. Owen*, (d) and to *Littleton*, 292 a, note 9; and to 2 *Fonblanque* on Equity, 262.

On the whole it seems to me that the land was not taken by the defendant *Stanton* as security for a debt; nor understood to be so between him and *Vanevery*, but that he consented to take the land and relieve *Vanevery* from the debt, though at the time he did this the land was not nearly worth the money he advanced. That we should look upon him as doing this partly perhaps to oblige *Vanevery*, and partly under the expectation that at some future day the land might so rise in value as to leave him not a loser, but possibly a gainer to a considerable extent.

Judgment

Having no claim which he could at any time or under any circumstances, enforce against *Vanevery* to re-pay him the money, he afforded him nevertheless an opportunity to resume his position as owner, if he should desire to do so at any time while he lived, and allowed

(a) 2 Atk. 494.

(c) 4 Milne & Craig, 179.

(b) 1 Vern. 191.

(d) 5 Milne & Craig, 303.

1868. his representatives a year after his death to make the same option if they thought it would be any advantage to the estate.

Stanton
v.
McKinlay.

After the option to take back the land was not only not used, but was positively declined, long after the last day limited, my opinion is, that it would scarcely have been right to allow redemption, even if *Stanton* had continued to hold the land in an unimproved state; but when it cannot be done without disturbing a purchaser for full value, who has made large improvements, and who did not acquire the land till many years after the heir had refused to take it back, I think it should certainly not be allowed in view of that provision in the statute 7 Wm. IV., ch. 2, which gives us so large a discretion. It is true that the decree would give to the defendant *Christie* the value of his improvements, but that would not compensate him for being turned off the place on which he has lived for many years, and for which he gave more than £400.

Judgment.

I think the decree should be reversed, and the bill dismissed with costs.

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1856.

June 27.

[Before the Hon. Sir J. B. Robinson, Bart., Chief Justice; the Hon. William Hume Blake, Chancellor;* the Hon. William Henry Draper, C. B., Chief Justice of the Court of Common Pleas; the Hon. Mr. Justice McLean; the Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; the Hon. Mr. Justice Richards; and the Hon. Mr. Justice Hagarty.*]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

THE MUNICIPALITY OF BERLIN V. GRANGE.

Assessment—Non-resident—Action for taxes—Pleading.

A non-resident owner of lands in a municipality is not liable to be proceeded against by action for the recovery of rates imposed in respect of such lands, unless it be averred and proved that the owner had personally or in writing informed the assessor that he owned the property, and desired to be assessed therefor; and the omission of the declaration to aver such request, is not cured by the defendants suffering judgment to go by default.

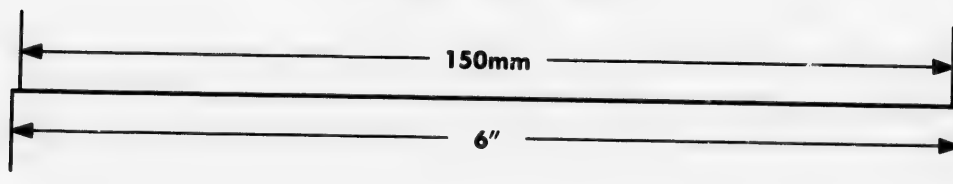
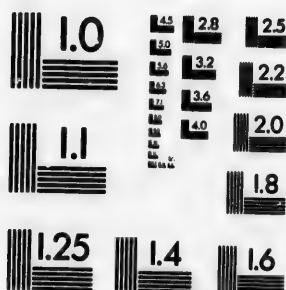
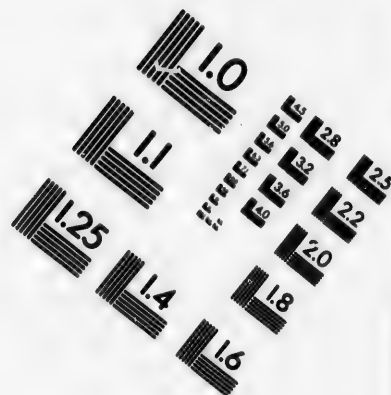
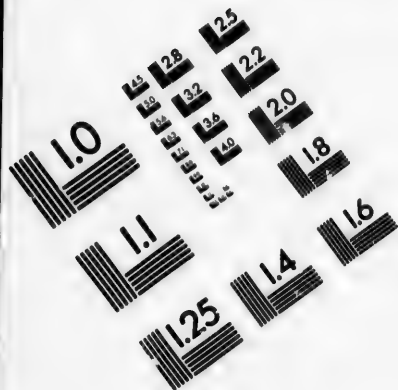
The action in the court below was instituted to compel the payment of certain taxes levied upon the defendant, in respect of some unoccupied lands owned by him in the village of Berlin. The court below had awarded a *venire de novo*, on the ground of the first count being bad, although the court were of opinion that the second count was good. Statement.

The declaration stated that at the time of the property being assessed, the defendant was resident without the limits of the village of Berlin, to wit, at Guelph, in the county of Wellington, (a different county from that within which Berlin is situated,) and was therefore rated as a non-resident by the assessors for Berlin on their assessment roll, and entered upon the assessor's roll for the annual value in the aggregate in respect of all his lands in Berlin, for £1110 9s., of all which said premises

* Were absent when judgment was delivered.

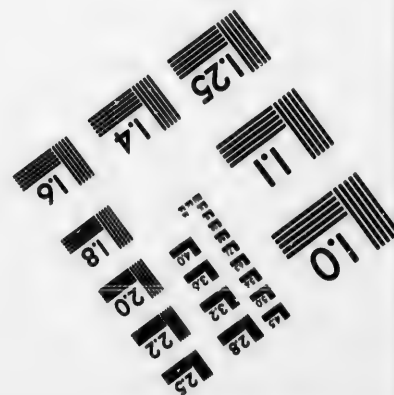


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1850.

Berlin
v.
Grange.

afterwards, to wit, on the 10th of April, 1854, due notice was given by the assessors to the defendant, according to the statute in that behalf, and that the valuation had not been appealed from or varied.

The declaration then set out the amount of rates to be collected for the year 1854, and the authority under which they were imposed, stating that the defendant's proportion of the amount to be levied as computed upon the assessor's roll, and set down on the collector's roll, came in all to £188 16s. 1d., being for the municipal purposes of the village of Berlin, and of the county of Waterloo, and for the Provincial Lunatic Asylum, in the proportions respectively set forth in the declaration :

Statement. "That on the 10th of December, 1854, the collector of taxes for Berlin gave notice to the defendant, who then was, and still is resident without the limits of the village of Berlin, of the said several rates so directed to be levied out of and in respect of his lands in the said village, and demanded payment from the defendant of the same according to the provisions of the statute. Yet defendant hath not paid, &c."

The declaration further averred that there were no goods on the said lands of defendant, or any of them, whereby the collector could have made by distress the amount of the said rates.

"That the said rates, nor any of them, were not paid to the plaintiffs, or to the treasurer of the county of Waterloo, but the same remained unpaid, by reason whereof an action hath accrued to the plaintiffs, (the Municipality of Berlin,) to recover the same from the defendant, &c."

Common counts were added for interest, and upon an account stated. Judgment by *nil dicit*. Damages were assessed, and the defendant afterwards moved in the

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Common Pleas to arrest the judgment. Judgment was given in that court that the action on the first count could not be sustained, but as there could be no objection to the sufficiency of the common counts, they did not arrest the judgment, but awarded a *venire de novo*. The plaintiffs appealed from this judgment, contending that the first count shews a good cause of action. The question being, whether this action could be sustained at the suit of the municipality of Berlin, to recover from the defendant the rates assessed upon his lands for 1854, he being a non-resident at the time of the assessment, and of the action brought, and there being no averment in the declaration that he had signified to the assessor personally, or in writing, that he owned such land, and desired to be assessed therefor.

1856.

Berlin
v.
Grange.

Mr. Connor, Q. C., and Mr. Gwynne, Q. C., for the appellants.

The statute 16 Victoria, ch. 182, (secs. 7, 8, 27,) clearly authorises the insertion of the name of the owner of real estate within the municipality, either upon request to that effect made by the owner, or where it is known to the assessor who the owner is. Here the name of the defendant is found entered upon the roll, and the court will presume that it was inserted thereon correctly; and in any event the name being upon the roll, the statute applies whether the name was so placed on the roll by the request of the owner of the land or not. The defendant had notice that his name was on the roll, and did not object or take any proceeding to have it removed.

Argument.

The 45th section of the act gives a general right of action; and when other remedies are given, which is the case by other clauses of the act, the object of the legislature was to enable assessments to be levied against unknown absentees. The defendant by his allowing judgment to go by default admits the claim as alleged

1856. by the declaration. As to the effect of *nil dicit*,
Taylor on Ev., 2nd ed., pp. 90 and 650, was referred to.

Berlin
 v.
 Grange.

Mr. Adam Wilson, Q. C., for the respondent.

Non-residents are not liable to be assessed, unless they expressly request their names to be inserted in the roll; here no such request is alleged by the declaration, and cannot be viewed as admitted by *nil dicit*.

There are three classes of cases liable to be assessed; in one, the name of the owner appears; in another, the name of the occupier; and in the third, the names of both are inserted in the roll; and the 8th section provides for another class. By the act the lands are made primarily liable. The owner of land having notice that his name is on the roll, is of no consequence, such notice cannot in any view be treated as an authority to place the name there. The Assessor's Act in placing the name on the list was illegal throughout, and notice to the owner of such illegal act having been performed, cannot render it binding on the owner.

Argument.

The seventh section will not bear a strict construction, the words, "if resident or known," are clearly erroneous, "or" should be read "and," and this is shewn more clearly to be the proper reading of this clause by the following—the 8th section—which explains the meaning of the seventh.

He referred amongst other authorities to *Re Glattan Land Tax*, (a) *Governor of Poor of Bristol v. Wait*, (b) *Stevens v. Evans*, (c) *Underhill v. Ellicombe*, (d) *Robinson v. James*. (e)

Mr. Connor, Q. C., in reply.

(a) 4 M. & W. 570.
 (c) 2 Burr. 1157.
 (e) 6 Jur. 714.

(b) 1 A. & E. 264.
 (d) 1 McL. & Y. 450.

SIR J. B. ROBINSON, BART., C. J.—The statute 16 Vic., ch. 182, must govern us in determining this question. I have examined its provisions and compared them with the enactments in the former law, which that statute repealed, viz., 13 & 14 Vic., ch. 67, as it was not improbable that some light might be thrown on the question by such a comparison.

1856.

Berlin
v.
Graze.

I concur in the judgment of the Court of Common Pleas that the first count does not state a legal ground of action, and that a *venire de nova* therefore must be awarded; though, as it is evident that nothing is intended to be claimed, except in respect of the cause of action stated in the first count, there would be no object in incurring the expense of going to another trial.

It is probable that the inaccurate language of the 7th clause in the evident misapplication of the disjunctive particle "or" may have led to the idea that the defendant's land in Berlin could properly be assessed against him by name, although he was non-resident and did not require to be assessed on the roll, for the words of the clause are, that all lands to whomsoever belonging shall be assessed in the township, village, &c., in which they lie, *and against the owner thereof if known or if resident*, or having a legal domicile, or place of business when the assessment shall be made within such township, village, &c., in which it is included. The plaintiffs seem to have proceeded on the idea that if the owner be *known* the assessor might assess him on his roll by name for his lands within the municipality, whether he himself was resident within it or not. But the whole frame of the act, and especially the 8th clause, shews that not to have been the intention. In the corresponding clause of the former act of 1851, which this new statute repeals, the language was so plain in this respect as not to admit of doubt, for that ran thus: "that all lands shall be assessed in the township, village, &c., in which they lie, and against the owner thereof, if known, and if he resides or has a legal

Judgment.

1856. domicile within such township, &c., but if the owner be not so resident, or be unknown, and the land be occupied, it shall be assessed in the name of and against the occupant."

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v.
Grange.*

There the meaning was plain enough; that before the assessor could assess the owner by name for his lands he must know that he resides within the municipality. In ordinary cases the change made in the language in the new act might be taken to indicate a change of intention in the legislature, but it is quite evident that in this instance that is not the case; and that the legislature no more meant by this act than by the other to provide that non-residents should be assessed for land in their own names on the roll, except where they themselves desired to be so assessed, which is the only change made in this respect by the late act.

Judgment. If we take the 7th and 8th clauses of the new act together, we can see plainly that what the legislature meant was to make it the duty of the assessor to assess all lands in the name of the owner, where such owner resided within the municipality, and was known by the assessor to be so resident, or when by diligent enquiry the assessor shall be able to discover that he is so resident. But the being in fact resident within the municipality, or having a legal domicile or place of business there, is made an indispensable condition to the proprietor being assessed for the land upon the roll in his own name, unless indeed being resident out of the township, village, &c., he shall have signified to the assessor that he owns such land, and desires to be assessed therefor.

The 8th clause of the new act, 16 Vic., ch. 182, is clear on that point, and is sufficient to correct any misapprehension that might have been otherwise produced by the inaccurate language of the 7th clause. And all the subsequent provisions in the act which have any bearing upon the question are consistent with the obvious construction of the eighth clause, and inconsistent

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with the other construction which might very naturally be given at first sight to the 7th clause. Then, as the declaration here shews, that the defendant was a non-resident land owner, and does not aver that he had avowed himself to be the owner, and had desired the assessor to assess him for it, upon what ground or principle is it that he can, notwithstanding, be taken for the purposes of this action, to have been legally assessed by name on the assessor's roll for Berlin, and thus made personally a debtor to the municipality for the amount of the rate, instead of having it charged simply against his land, as directed to be done in the case of other non-residents? I do not think that he can be held to have acquiesced in what was done, because he did not object before the court of revision, for the revision of the roll is for purposes different from the correction of any wholly void and unauthorised act of that kind. And when the statute provides (a) that after the roll has been finally passed by the court of revision, it shall bind all parties concerned, notwithstanding any defect or error committed in, or with regard to such roll, that cannot, I think, be taken to mean that it shall be binding on a party whose name there was never any legal authority for introducing upon the roll at all, because there the very foundation of assessment against *the party* is wanting.

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Grange.

Judgment.

Besides, if the giving notice to the defendant that *he had been assessed* on the roll for those lands when, by law, he could not be, except at his own desire, would make a difference in the case, it would be necessary that it should appear in the record, which it does not, that such notice was given in time to enable the defendant to appeal within the limited number of days. I am of opinion, however, that the forbearing to appeal would in such a case make no difference; for the non-resident, knowing that he could not legally be assessed by name on the assessment roll of Berlin without his own request,

(a) Sec. 26.

1855.

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v.
Graug.

might safely, I think, omit to take any notice of such an illegal and void proceeding. He might, in any such case, be at so great a distance from the municipality that he could not in time, with any convenience, attend to watch the different steps in the illegal assessment, and the legislature clearly intended that, with regard to non-residents, who have not desired to be assessed on the roll where their lands lie, a wholly distinct proceeding shall be adopted.

We need not consider here whether the want of an averment that the defendant had desired to be assessed on the roll could be cured by verdict, because this was an assessment of damages on a judgment, by *nil dicit*, and unless the count would be sufficient on general demurrer, it must fail.

Judgment. The declaration states that the defendant, being resident without the limits of the municipality, "*was rated as a non-resident*," which is plainly contrary to the statute, the direction being, that in such a case, the land should be charged, and not that the owner should be assessed on the roll; but then it has been contended that upon the principle that in public matters of this kind, *omnia presumuntur rite esse acta*, it will be assumed that that occurred which would make it legal, namely, the request of the party to be so assessed. If, however, that presumption might be entertained so as to dispense with proof in the first instance of the averment, in case it had been made, yet that would not establish that the averment itself could be dispensed with.

The desire of the *non-resident* to be assessed in the municipality, lies at the foundation of the debt against him personally, and is as necessary to support the assessment, as a judgment is to support an execution.

I observe that Mr. Justice *Richards*, in his judgment below, did not take the same view of this point, but he

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v.
Grange.

was strongly against the sufficiency of the declaration upon other grounds, in which I am disposed to concur. I must observe, however, that though I think we are bound to confirm the judgment given below, it appears to me that a difficulty may arise under the 40th clause, unless some legislative provision shall be made to meet it, for, as that clause stands, whenever an assessor takes upon himself to enter a non-resident's name on his roll, and assess him for land in the municipality, though without any pretence for doing so, the clerk of the municipality could not, consistently with that clause, transmit the return of such land to the county treasurer, and the latter would thus be without the information required for enabling him to charge the assessment against the land. I do not see, at present, how that inconvenience is to be overcome; but the apprehension that it may in some such cases arise would not warrant us in going against what appears to me to be the plain provisions of the statute, and especially, when by doing so, we should be supporting a proceeding which would be attended with the inconveniences and perplexities pointed out by some of the learned judges in the court below.

Judgment.

I think the appeal must be dismissed with costs.

DRAPER, C. J.—The first question is, whether the defendant, as a non-resident within the village of Berlin, could properly be rated on the assessment roll, in respect of lands owned by him, situate within that village. If the 7th section of the act (16 Vic., c. 182) is correctly printed, and the word "or" immediately following the words "*the owner thereof, if known,*" is to be read and construed as a disjunctive, then he might, for he was known as the owner of these lands.

I think, however, the words "all lands, to whomsoever belonging, shall be assessed in the township, village, or ward in which they lie, and in the name of, and against the owner thereof, if known, or if resident, or having a

1856.

*Devlin
v.
Grange.*

legal domicile or place of business, when the assessment shall be made within such township, village, or ward," are not intended to represent alternatives, but that the true construction is, "if known, and if resident," &c. The distinction contemplated by the legislature seems to be between occupied and unoccupied land, belonging to resident or non-resident owners. If the owner be known and resident, or being known, though non-resident, if he have a legal domicile, or place of business, distinct from his actual residence; then whether he occupy the lands, (which he may do without residing on them,) or if no one occupy them, they are to be assessed in the name of the owner. If the lands are occupied by a third party, but owned by a person known and resident, or having a legal domicile or place of business within the municipality, they may be assessed in the name of the owner or occupant. Unoccupied lands, not known to be owned by any resident, or person having a legal domicile or place of residence, or whose residence, or legal domicile or place of business within the municipality cannot be ascertained by the assessors, are to be denominated the lands of non-residents, unless the owner, being resident out of the municipality, shall have signified to the assessor that he is owner, and desires to be assessed therefor. (a) As to this section, the construction is not open to the doubt to which the language of the 7th section may give rise. It clearly provides that unoccupied lands must be assessed as the lands of non-residents, unless—1, known to be owned by a party resident, or having a legal domicile or place of business within the municipality; or—2, if the residence, domicile, or place of business of the owner (though he be known) is not to be found within the municipality by the assessor on diligent enquiry; or—3, if the owner, being a non-resident, signifies to the assessor that he is owner, and desires to be assessed therefor.

Judgment.

(a) Sec. 8.

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* Sir J.
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In the present case the lands are unoccupied, and the owner, the defendant, is non-resident. These facts are apparent on the declaration. In my opinion, it follows that the assessor had not in *himself* authority to insert the defendant's name on the roll as owner of these unoccupied lands. It was an act not to be done *sud sponte*. The declaration, however, further states that the defendant is rated on the roll as owner of these unoccupied lands. This could only be done *lawfully* upon his request. Unless, therefore, his suffering judgment by default cures the defect, in not averring such request, the declaration is bad.

1854.

North v. Grange.

By *nil dicit* the defendant admits every thing alleged in the declaration. If, therefore, enough is stated to sustain the declaration on general demurrer, it will be sustained now. Assuming as I have said I take, the statute to mean that the name of the defendant could not be placed on the assessor's roll without his request, I should have some difficulty in holding this declaration good in the absence of the averment. The Court of Common Pleas * have held the case to come within the maxim, "*Omnia presumuntur legitime facta donec probetur in contrarium.*" I do not feel so clear that the case comes within that principle as the learned judges appear to have been; but, as I agree with the judgment upon another ground, it is unnecessary to discuss this question.

Judgment.

It does not appear to me that a party can be rated on the assessment roll as a non-resident, in respect of personal property. The 7th and 8th sections of the act apply to land only. The 11th section points out clearly where personal property is to be assessed, namely, at a party's place of business, or at his place of residence. The very nature of personal property implies that it is in possession of some one, and every party is, I take it, intended to be assessed for all taxable

* Sir J. B. Macaulay was Chief Justice at the time the cause was decided in the court below.

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v.
Grange.

Judgment.

personal property in his possession, such possession being *prima facie* proof of ownership. The fact that he has possession as trustee, guardian, executor, or administrator, does not affect his liability to be assessed. The language of the 17th section confirms this view as to residents; it calls them "taxable parties," requiring their names to be on the rolls; as to non-residents, it uses the term "freeholders," who have required their names, and the lands owned by them, to be entered on the roll. The proviso prohibiting such non-residents from voting at a municipal election, also uses the term "freeholder." The proviso to the 69th section is not inconsistent with this observation. I think all the sections of the act, from sec. 48 to sec. 75, inclusive, relate solely to taxes upon lands. The language of the 50th section, it is true, is more general. It enacts, that from the time that the collector's roll has been returned to the treasurer of his (the collector's) municipality, no more money shall be received on account of the arrears then due by any officer of such municipality; but the collection of such arrears shall belong to the county treasurer alone, and he shall receive payment of of any such arrears, and of all the taxes on lands of non-residents, an account of which is to be transmitted to him. The terms "*such arrears*," and "*any such arrears*," are large enough to include rates on personal, as well as on real property. But every word that follows afterwards—the proceedings directed to be taken, the ten per cent. interest to be added annually to the arrears, the time after the expiration whereof the treasurer's warrant for selling lands is to issue—appear to me to be confined to arrears for taxes upon land, and to provide the mode by which payment of them is to be enforced, after the collector has failed to get them.

But as to arrears of taxes on personal property, the remedy is given to the proper municipality by the 45th section. It would be difficult, otherwise, for the municipality to recover the arrears as a debt. The right to sue does not accrue to the municipality, until the collector

has ascertained and returned that he cannot recover the taxes; and within fourteen days after the collector's return, the treasurer of the municipality is to make his return to the county treasurer. This return, however, (sec. 49) relates only to lands, and it so far confirms the opinion expressed as to the true meaning of the 50th section, which, if construed to include taxes on personal property, would either limit the municipality to the right to sue within fourteen days, or would give rise to this inconsistency, that the municipality would be suing for, and recovering moneys which the 50th section enacts shall not be received on account of the arrears then due by any officer of the municipality. On the whole, it appears to me that it was not the intention of the legislature that the remedy given by the 45th section should extend to arrears for taxes on lands, or, at all events, until the remedies given, and to be put in force by the county treasurer, had been resorted to, and had failed in producing satisfaction. As a consequence, I am of opinion *Judgment.* this appeal should be dismissed.

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*Berlin
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Grange.*

Per Curiam.—Appeal dismissed with costs.

1859.

[Before the Hon. Sir J. B. Robinson, Bart., Chief Justice; the Hon. W. H. Draper, G. B., C. J., C. P.; the Sir J. B. Macaulay; the Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]

[ON AN APPEAL FROM THE COURT OF CHANCERY.]

TOPPING V. JOSEPH.

Equitable assets—Judgment creditor—Principal and surety.

H. obtained from his debtor an assignment of his books of account, notes, bills, and other evidences of debt, by way of security against the consequence of his becoming a party to notes for the accommodation of the debtor; and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum of money by reason of his being a party to such notes, H. recovered judgment against the debtor, and sued out execution thereon, which was the first placed in the hands of the sheriff, against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff, upon which sale sufficient was realised to pay the execution of H., and leave a balance in the hands of the sheriff, and H.'s claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor, after notice from J., a later judgment creditor, not to part with them; and the father's land was re-conveyed to him. The execution creditor who gave the notice, claimed in consequence priority over intermediate execution creditors, and also a right to compel H. to make good the amount of his claim in consequence of having parted with the securities. Upon appeal from the Court of Chancery, *Held*, 1st, affirming the decree of the court below, that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions; nor had he any right to call upon H. to assign the lands conveyed to him by the debtor's father; nor was H. personally liable to the subsequent execution creditors.

Held, 2ndly, reversing the decision of the court below, [ESTEN, and SPRAGGE, V. CC. dissenting.] that the securities in the hands of H. being, at that time, not seizable under common law process, no right vested in H. to transfer them to him, nor was he bound to make good to J. any loss sustained by him by reason of his refusal to deliver the securities to J., but that such securities being in the nature of equitable assets, they should be distributed amongst all the creditors *pari passu*. And per Sir J. B. ROBINSON, Bart., C. J., that this was not a case to which the principle of marshalling the assets applied, and that H. had a perfect right to restore the securities to the debtor.

After the determination of the case by the court below, as reported in 5 Grant, page 636, *Topping*

was added as a party in the master's office. The plaintiff on the 9th of April, 1857, filed his amended bill, making *Brown* a defendant instead of a co-plaintiff, and by consent of counsel a statement to this effect was printed and used on the argument of the appeal.

1850.

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v.
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From the decree pronounced in the court below the defendant *Topping* appealed, contending that the appellant and respondent being equally meritorious creditors of *Morgan*, and the goods on which the respective writs of execution attached, having been exhausted by prior writs, the right of the appellant and respondent to resort to the book debts, was at first equal, and the appellant having thereafter by due diligence acquired an assignment of such debts and the possession of the books and papers verifying the same, it is not equitable to deprive him of that advantage; that as against the appellant the *fi. fa.* of *Joseph & Brown* in the hands of the sheriff, created no lien on the *choses in action* and personal securities of *Morgan*, and there was no equitable reason under all the circumstances to prevent *Topping* from taking an assignment of the *choses in action* in the manner he adopted for valuable consideration, and to secure his own debt; that before *Topping* was made a party to the suit, he got possession of the books and papers of *Morgan*, and had entered into and performed a material part of the onerous undertaking on which the assignment under which he claims was made, and the respondent has shown no equity that ought, under all the circumstances, to be allowed to displace the equity of the appellant; that at the time of the assignment in the pleadings mentioned, dated the 7th of April, 1855, *Brown* had power to accept the same on the part of *Joseph & Brown*, and he did so, and thereby bound them, and the same was acted on with *Joseph's* concurrence for ten days or thereabouts; that the conduct of *Joseph* in afterwards disclaiming such assignment was contrary to fair dealing and good conscience; and he thereby disentitled himself to any preference or priority over the appellant, if otherwise

Argument

1859. he had been entitled thereto; that such disclaimer could extend only to *Joseph's* own interest in the debt due himself and *Brown* jointly as co-partners, (all the debts due by the partnership having been paid off,) yet the decree extended the disclaimer and its consequences to *Brown's* share also; that *Brown* did not mean to lose his position in the assignment of the 7th of April, except by transmuting the same into that which he had acquired in the assignment of the 23rd of May, in the pleadings mentioned; and that *Brown* was estopped by his own conduct and deed, so far as regards his own share of the debt due to *Joseph & Brown*, from seeking that share in any manner inconsistent with the assignment of the 23rd of May.

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Argument. For the respondent, it was insisted that the case made by the bill, and supported by the evidence in the cause, is clearly one in which the equitable doctrine of "marshalling securities" applies; that the appellant received the securities, in the pleadings mentioned, with full notice and knowledge of the equitable lien and claim of the respondent thereto; that the alleged concurrence of the defendant *Charles Brown* was procured by the appellant with the intention of defeating the rights of the respondent; and the appellant and the said *Charles Brown* fraudulently colluded together with that object; and that the appellant received the said securities not only with such notice and knowledge as before mentioned, but with the fraudulent intent and design of depriving the plaintiff of his right thereto.

Mr. McDonald, for the appellant.

Mr. A. Crooks, for the respondent.

Vint v. Padgett, (a) *Barnes v. Racston*, (b) *Baldwin v. Belcher*, (c) *Gibson v. Seagrim*, (d) *Rigney v.*

(a) 4 Jur. N. S. 1122.
(c) 3 Dr. & War. 178.

(b) 1 Y. & C. C. C. 401.
(d) 20 Beav. 614.

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Vanzandt, (a) *Brandon v. Brandon*, (b) *Edgell v. Haywood*, (c) were with other cases referred to by counsel. 1859.

Topping
v.
Joseph.

SIR J. B. ROBINSON, BART., C. J.—The defendant, *Morgan*, was a shop-keeper in Brantford, and became indebted to the defendant *Heaton*, in about £3,000; to the defendants *Joseph & Brown*, in about £800; to defendant *VanBrocklin*, in £1,200; to defendant *Batson*, in £200; and to the appellant *Topping*, in about £3,590.

In March, 1855, *Heaton*, to secure his large debt, which was for liabilities assumed for *Morgan*, in order to assist him in his business, took from him a confession of judgment for the amount, without any stay of judgment or execution, and about the same time, for fear of executions at the suit of other creditors getting first into the sheriff's hands, he took from *Morgan*, in further security of the same debt, an assignment of all his book debts, notes, bills, and other outstanding debts. Judgment.

On 30th March, 1855, a *fi. fa.* in the suit, *Heaton* against *Morgan*, was delivered to the sheriff, being the first writ.

On 2nd April, a *fi. fa.* came to the sheriff, at the suit of *VanBrocklin* against *Morgan*, and also a *fi. fa.* at the suit of *Batson*.

On 4th April, a *fi. fa.* at the suit of *Joseph & Brown*, and afterwards, on the same day, a *fi. fa.* at the suit of *Topping*.

On these writs the stock-in-trade of *Morgan* was sold. The creditors had agreed, before the sheriff's sale, that in order to make the sale as productive as possible, they

— (a) 5 Gr. 496.
(c) 3 Atk. 352.

(b) 5 Jur. N. S. 256.

1855. would accept approved notes from the purchasers, payable at 3, 6, 9, 12, and 15 months.

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Joseph.

One Bacon bought on these terms, but failing to carry out his purchase, the sheriff, at a subsequent sale, disposed of the goods to *VanBrocklin*, who became the highest bidder, and gave his notes for the price.

Heaton accepted some of these notes, in full discharge of his debt; and having no longer any demand against *Morgan*, he gave back to him all his books and securities for debts that had been assigned to him, and conveyed back to *Morgan's* father some land upon which he, the father, had given security to *Heaton*, on behalf of his son.

Judgment. On 19th May, 1855, two days before the sheriff's sale of *Morgan's* goods, the attorney of *Joseph & Brown* wrote to *Heaton*, stating that he (*Heaton*) held both an assignment of *Morgan's* book debts, notes, and other securities, and also an execution against his goods, and as, by resorting to the proceeds of the sheriff's sale under his *fi. fa.* for the payment of his debt, he would prejudice the interests of *Joseph & Brown*, who had only the proceeds of such sheriff's sale to look to, being plaintiffs under a subsequent execution against *Morgan* they, *Joseph & Brown*, claimed to have the securities and book debts that had been assigned to *Heaton*, and the proceeds of the sheriff's sale marshalled for their benefit, and they stated that they gave him this notice of their rights, meaning to hold him responsible.

On 22nd May, 1855, after the sheriff's sale, the attorney of *Joseph & Brown* wrote again to *Heaton*, adverting to their former letters, and requesting to be informed whether he intended to resort to the proceeds of the sheriff's sale, which had already taken place, for the satisfaction of his debt, for that, in that case, they would claim an assignment of all his other securities for the

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indemnification of themselves, and of others who might be similarly prejudiced; and would insist upon their right to stand in his place as to the other securities, and would take steps to enforce that right.

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The principal facts of the case are stated in an answer to this letter, written 23rd May, 1855, by Messrs. *Wood & Long*, to the attorney of Messrs. *Joseph & Brown*, which answer is set out at length in the bill.

On the 7th April, 1855, *Morgan* had executed an assignment to *Joseph & Brown*, who were then still partners in business, and to the defendant *Topping*, of all his stock-in-trade, and other goods, and of all his book debts and accounts, bills, notes, &c., which was cancelled on 18th April, 1855, because *Joseph* declined to accept and act under it. And on 21st and 22nd May, 1855, after *Heaton* had received the letters written to him by *Joseph's* attorney, asserting his right to have what in the letters is called a marshalling of securities in his favour, and immediately after the sheriff's sale of *Morgan's* goods, through which *Heaton* had received satisfaction of his debt in full, *Heaton* was required by *Morgan* to give back to him the accounts, books, and securities, which, upon the assignment being made to him in March previous, had been put into his hands by *Morgan*. *Heaton* then advised with his attorney what he ought to do, in consequence of the notices which he had received from *Joseph's* attorney of the course which he would hold himself entitled to pursue; and being advised that he could not withhold from *Morgan* the securities which had been delivered to him, since the debt which they were to secure had been satisfied, he restored them to *Morgan*; and on the 23rd of May, *Morgan* executed an assignment of them to *Topping* and *Brown*, omitting *Joseph*, because *Joseph* had refused, he admits, to be a party to such an assignment.

Judgment.

Joseph alleges that this assignment to *Topping &*

1859. *Brown* was made without his privity, and that he suspects a fraudulent collusion to his prejudice, between *Topping* and *Brown*, who went into partnership together, immediately upon *Brown* ceasing to be a partner with *Joseph*, that is, on 30th May, 1855.

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Brown had no individual demand *at Morgan*; his only pretence, therefore, for accepting the assignment to *Topping* and himself, could be the debt due to *Joseph & Brown*; but *Joseph*, nevertheless, contends that his interest ought not to be in any way prejudiced by that act of *Brown* not done in the name of the firm, nor in privity with *Joseph*—his partner at the time, nor, as he asserts, in good faith for protecting the interests of the firm, and he reverts, therefore, to what he considers to be his equitable rights, of which he had, through his solicitor, given notice to *Heaton*, before the sheriff's sale, and in order to enforce them he filed this bill, praying that so far as he and *Brown* may be prejudiced, in recovering the amount of their debt from the proceeds of the sale by the sheriff, in consequence of *Heaton* having resorted to that fund for the payment of *Morgan's* debt to him, the defendant, *Heaton*, may be declared to be a trustee of the securities which had been put into his hands by *Morgan*, for securing the same debt; that *Joseph & Brown* may be substituted in the place of *Heaton*, as holder of such securities; and that the same may be assigned accordingly; and that if *Heaton* shall have parted with them or impaired them, after the notice he had of *Joseph & Brown's* equitable rights, he may be decreed to make good any loss which *Joseph & Brown* have sustained thereby.

Judgment.

The facts of this case are more fully stated in the evidence; but I have not thought it necessary to go into them more particularly than I have done, for, besides the fact that if *Joseph* has suffered any disadvantage, from not standing in the place of *Heaton*, as holder of these securities, debts, &c., which *Morgan* had assigned

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to *Heaton*, and which he was desirous to avail himself of, for obtaining payment of his debt, that is entirely in consequence of his having rejected the assignment which was made to him in April, 1855. I am not able to satisfy myself that the plaintiff, *Joseph*, has the equitable claim that he relies upon, as the foundation of his suit. It has been decreed that *Joseph* and *Brown* are entitled to stand in the place of *Heaton*, as to the securities mentioned in the bill; that they are entitled to a lien thereupon, in respect of their judgment against *Morgan*; and that *Heaton* is responsible for any loss that has resulted to *Joseph & Brown*, by reason of his re-assignment or surrender of the securities to *Morgan*.

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The judgment of the court was delivered by Mr. Vice-Chancellor *Spragge*, and is reported in 5th *Grant's Reports*, 636.

I have great reason to distrust my own opinion upon questions, such as are presented in this suit, of which we have no experience in courts of law; but according to the best judgment I can form, this was not a case for applying the equitable doctrine of marshalling securities. Judgment.

In *Lanoy v. the Duke of Athol*, (a) Lord *Hardwicke* states it "to be the constant equity of that court that if a creditor has two funds he shall take his satisfaction out of that fund upon which another creditor has no lien—as, suppose a person who has two real estates, both mortgaged to one person, and afterwards only one of the estates to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee."

(a) 2 *Atkins*, 444.

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Lord Eldon, in *Aldrich v. Cooper*, (a) states the principle thus:—"It is the ordinary course in equity that a person having *two funds* shall not, by this election, disappoint the party having *only one fund*, and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him."

Judgment.

It cannot, I think, be said here that there were *two funds*, in one of which the plaintiff, *Joseph*, had a particular interest, and in the other not, while *Heaton* had an option to resort to either. *Heaton* had obtained a judgment against *Morgan*, the common debtor of both, and he had, besides, an assignment of all *Morgan's* debts by bonds, notes or accounts, intended to afford him some security, though, by no means an adequate one, as it appears from the evidence for his large debt, in case any other creditor of *Morgan* should be found to have come in with an execution against *Morgan*, before *Heaton* could take out his writ of *fiery facias*, and deliver it to the sheriff.

If this were a case in which the plaintiff was endeavouring to obtain the interference of a court of equity, to restrain *Heaton* from making use of his judgment and execution, until he had first exhausted his security under the assignment, it cannot be contended for a moment that the court would interfere for that purpose, for *Heaton*, though he held the assignment in question, had the same common law right as every other judgment creditor would have, to enforce the payment of his debt by execution. If he had been required to wait till it could be ascertained how many of *Morgan's* debts he could succeed in collecting, we can see plainly that his judgment would have been of little use to him, for other creditors of *Morgan* (and the plaintiff among the number) would have pressed forward with their executions,

(a) 8 Ves. 382.

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and he would soon have found himself in a much worse situation than if he had taken no security. It is true that in this case there was no attempt to restrain *Heaton* from enforcing his judgment, but the plaintiff claims it as an equitable consequence of *Heaton's* having received satisfaction by means of his execution, that he shall be allowed to stand in *Heaton's* place, in regard to the notes, debts, &c., which *Heaton* had held. The foundation of such an equity is explained to be, that a man *having two securities* ought not to exercise his option of proceeding upon one or the other of them in such a manner as unfairly to injure another creditor. When he does so, he is said to act capriciously and unjustly, and to afford ground for the interference of a court of equity in the manner applied for by this bill.

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But can that principle be applied, as regards the creditor of a debtor, which debtor has not, by any act of his, created a double security? I think not. Upon the same principle that the plaintiff should succeed in his suit, it should follow that in all other cases, a mortgagee who has taken a bond to accompany his mortgage, and obtains judgment upon it, or upon his covenant contained in the mortgage, and compels payment of his debt by execution, should be obliged to assign his mortgage to any creditor of the mortgagor that might ask for it, upon the ground that he ought to have sold the estate under the power in his mortgage, or should have brought ejectment.

Judgment.

The other creditors of the mortgagor might urge what is urged here, that by taking execution against the goods of the mortgagor he had, so far, impaired the ability of the mortgagor to pay his other creditors, and should, therefore, surrender his mortgage for their benefit. But it would certainly be a very inconvenient equity to be introduced in such cases, for, hitherto, when a mortgagee has been paid his debt, no obstacle has been interposed to his discharging the security, or re-conveying the estate; though, if the plaintiff is right in what he con-

1869. tends for, I can see no reason why a third party, to whom the mortgagor was indebted, should not, in any such case, have as good a right to apply to be substituted in the place of the mortgagee, who has been paid his debt; and yet, I have never known an attempt of that kind made, and can find no trace of a suit founded upon such a supposed equity.

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I do not consider that it could, in the view of a court of equity, have been thought at all reasonable that *Heaton* should have been expected to forbear proceeding on his judgment, until he had done his best to collect all the debts due to *Morgan* from his customers. In following up his judgment by an execution, he was only doing what any other judgment creditor of *Morgan* had a right to do; he was not taking to himself any particular fund in which *Joseph* had a special interest, and if there was nothing unreasonable in his having done what he did, then I do not see how such a consequence should follow from it as would be made to follow by the decree.

Judgment.

It is material, also, to consider that the assignment made by *Morgan* for securing *Heaton's* debt was one of a peculiar character. It was not like a bond of a third party, or like a mortgage that is commonly given for securing a debt. It vested in *Heaton* no tangible property, real or personal; but only all *Morgan's* claims of every kind against third parties, his customers and others, with full power and discretion to use his name in collecting the debts, and in compromising with his debtors. Such a trust he might be willing to repose in one man, and not in another, either for his own sake, or for the sake of his debtors. It required diligence, perseverance, discretion, and integrity, and good knowledge, and habits of business; and it would be strange, I think, if the owner of such debts and securities should be compelled to place such a confidence in any one of his creditors who, under such circumstances, might choose to ask for it.

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We have been informed at the bar, that either from some compromise that has been come to, or from some changes that have taken place lately, in the circumstances of parties to this suit, the decision has become a matter of no moment except as regards costs. I cannot be certain that I take a correct view of the main question that was raised in the case, since most, I believe, of my brother judges incline to the contrary opinion.

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I have referred, however, to the case of *Greenwood v. Taylor*, (a) and to the case of *Mason v. Begg*, (b) and the observations made in the latter case upon the former have confirmed me in the impression that this can not be a case for applying the equitable principle of marshalling securities. It is material to consider that this is not like *Aldrich v. Cooper*, a case of marshalling the assets of a deceased debtor, but is a case in which the court was asked to apply the principle of marshalling securities, the debtor being still living; and (as I have already stated) upon the same principle on which the object of this suit could be obtained, any of the judgment creditors of a mortgagor could claim as a matter of right to have a mortgage assigned to him, which had been given to another creditor of the mortgagor, who had compelled payment of his debt, through an execution, without resorting to the special security held by him. I think I am safe in saying, that in the whole period since the establishment of our Court of Chancery, no instance has occurred of such an equity being enforced, nor have I ever heard of an attempt to advance a similar claim on the part of any general creditor of a mortgagor, though it need hardly be said that cases have been constantly occurring in which there were the same grounds for such a suit, as in the present case, and in which it would have been manifestly for the advantage of a creditor to avail himself of the remedy, if it were open to him. I have found no trace, either,

Judgment.

(a) 1 Russ. and Myl., 185.

(b) 2 Myl. and Cr., 443.

1859. of a suit sustained in England under similar circumstances. This has made me entertain great doubts as to the right; though, in discussing cases of a different kind, there has been language used by text-writers which may seem to recognise it.

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Then there is the further objection which I have noticed, that what the plaintiff in this suit was applying for, was not simply to have a security assigned to him that was of an ordinary character, such as a mortgage of lands, or of chattels, but a transfer of choses in action, undefined in amount, which contained power to sue for, and collect all the book debts, &c., in the name of the person making the assignment; the effect of which would be to clothe this plaintiff with a trust of a special character, which, for various reasons, he might have been little qualified to execute, and which, therefore, he would never have been entrusted to execute by the parties having an interest in the matter, that is, by *Morgan*, or by his creditors generally.

Judgment. It may, it is true, be said that by executing the deed of 7th April, 1855, *Morgan* had shewn that he did not look upon *Joseph* as a person whom he would hesitate to entrust with power to collect all his debts, &c., since he had actually made him a trustee for that purpose by that deed. But the fact that he did make that assignment to *Joseph* and others, and that *Joseph* wholly rejected it, and declined to act under it, opens the way to another objection to the plaintiff's suit, which has been urged, and I think not unreasonably, for it can hardly be admitted that *Joseph* was entitled thus to play fast and loose at his discretion, and, after rejecting the assignment which *Morgan* had executed, to insist afterwards upon *Heaton's* making an assignment of the debts to him, or to claim to hold him responsible for any loss which he (*Joseph*) had suffered from the books and securities having been returned by *Heaton* to *Morgan*, after the debt had been satisfied, for which he had held them as security.

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For these reasons, I should have thought it right to reverse the decision, and to dismiss the plaintiff's bill with costs; but my brothers, in general, are against giving *Topping*, who alone appeals, his costs, and so the bill, as to *Topping*, is dismissed without costs.

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DRAPER, C. J.—*Heaton* was, as appears to me, a creditor having a double fund to look to for payment.

When he endorsed for *Morgan's* accommodation he took a *cognovit actionem* as his security, and the deed of the 22nd of March, 1855, but executed on the 30th of March, on which day the *fi. fa.* issued by *Heaton* was put into the sheriff's hands.

There can be no doubt that *Heaton* had a right to obtain satisfaction either through his execution, or under the assignment. But his election could not be made prejudicial to the interests of the other creditors.

Judgment.

Strictly speaking this is not a case of marshalling, but there are many cases in which the principle is applied between living persons, as pointed out by Lord *Eldon*, in *Aldrich v. Cooper*, that principle being "in some degree that it shall not depend upon the will of one creditor to disappoint another;" and further, that a creditor to secure whom a debtor has subjected some particular property, and who therefore "can make it liable to that extent shall not by his will defeat another, the former having two funds, the latter only one."

Morgan, by his own act, gave *Heaton* recourse against certain parts of his personal estate, which an execution at law would not reach, leaving him at the same time his full right to all legal remedies to recover his debt. He could therefore have recourse to the one by way of execution; to the other, by force of the deed of 22nd March, 1855, and the principle I take to be, that he shall not by his election to make use of the execution to

1560. obtain satisfaction, disappoint other creditors, who have only the personal estate which may be taken in execution to look to. Such creditors, it is true, have no claims in law, over the effects assigned to *Heaton*; but if they be deprived of the single fund to which they could have recourse by *Heaton's* act, then they are, as I understand the cases, entitled to stand in *Heaton's* place as to the fund specially created and set apart for *Heaton's* satisfaction.

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This I take to be the general principle, and the question is, whether the plaintiff is entitled to the relief he asks for, especially under the particular circumstances.

Judgment. I cannot understand the plaintiff's conduct. He appears to have acquiesced in and approved of the arrangement of the 7th of April, 1855, by which, subject of course to the prior satisfaction of *Heaton, Batson*, and *VanBrooklin's* executions, any balance of the debt due by *Morgan* would have been paid out of the effects assigned. It appears that the object of the parties to this arrangement was, that the goods seized in execution should, instead of being sold in the usual manner for cash, be sold on a credit, satisfactory endorsed notes extending over a long period being taken as payment. A sale was made on this understanding, for *Heaton, Batson*, and *VanBrooklin* agreed to take such notes for their claims, and the goods of *Morgan* were sold to one *Bacon* at 13s. 9d. in the pound of their invoiced value. But the plaintiff, who it is sworn had agreed to endorse the notes for certainly one-third of the amount, and according to *Bacon's* recollection, for the whole, refused to endorse at all; and other parties were offered as endorsers, whose names were not satisfactory. *Brown* swears positively that before he wrote the letter of the 18th of April, 1855, plaintiff had repudiated the agreement. The date of the first sale, *i. e.*, that at which *Bacon* purchased, does not appear; but the second was on the 21st of May, and the goods were then sold at 12s. in

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I am driven to the conclusion that the arrangement of the 7th of April was defeated through the plaintiff's refusal to endorse, and there is some reason for suspecting, though I cannot say I think it proved, that he imagined he had gained an advantage by the execution of the deed of the 7th of April, and meant to rely on it, and not to fulfil his undertaking respecting the sale of the goods on credit.

Whatever rights the plaintiff may have had so long as he had only his judgment and execution, while *Heaton*, in addition to his prior execution held the assignment of the 22nd of March, 1855, the state of affairs was materially altered by the arrangement of the 7th of April following. The plaintiff thereby acquiesced in *Heaton's* obtaining satisfaction out of the goods seized in execution in order to release his claim upon the debts and effects assigned, and to take the assignment of the 7th of April from *Morgan*, not from *Heaton*, as his claim would be extinguished in the manner proposed. After this, I do not perceive what equity he can have to claim against *Heaton* the assets so assigned to himself, the plaintiff, or how he can give himself such a right by failing to fulfil the latter arrangement. Judgment.

It has been strongly pressed upon us, that *Heaton* could not for his own satisfaction have converted the debts, &c., assigned to him, into cash, until after exhausting the chattels taken under his execution, and that the moment the sale by the sheriff produced enough to pay him, he was bound to return to *Morgan* what the latter had assigned to him.

However this might be, I think enough appears to disentitle the plaintiff to the relief he asks for, and that the bill should be dismissed with costs.

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ESTEN, V. C.—There is no ground for the argument that *Heaton* was bound to resort to his execution in the first instance. Mr. *Wood's* evidence and letter are equivocal, but the assignment settles the question.

Judgment.

Upon the other point I am not prepared to concur in a variation of the decree. Much, perhaps, may be urged on both sides. These securities are not assets in the strict sense of that term; but the securities could not be reached at law by legal process, nor in equity on the principle of equitable execution, not being liable to debts at all in the life-time of the debtor, and so far they resemble equitable assets; and it would not be unjust to apply the doctrine of equitable assets to them. On the other hand it seems reasonable to give the creditors the same remedies against them as they would have had against the goods, and at all events it is very unjust to *Joseph* to raise the question for the first time on appeal, since he cannot have the benefit of it: the prior creditors having been paid in full, and at any rate it ought not to vary the decree as to costs, since *Joseph* would have willingly taken such a decree; and a suit was necessary to enable him to obtain any relief, the defendants resisting all relief. I think the decree should be affirmed.

BURNS, J.—The respondent's case is not rested upon the proposition of a contract between the creditors of *Morgan* and *Morgan* himself, which entitles them or any individual creditor to claim the right of standing in the place of *Heaton* with respect to the securities which *Morgan* had assigned as collateral security for *Heaton's* endorsements for him; but the respondent's claim to an equity in his favour rests upon the broad doctrine that where one creditor has a charge or lien upon two funds, or two sets of security for the same debt, to either of which he may resort, a court of equity, though in a case like the present, where it neither can nor will compel the creditor to elect which he will look to, yet when he

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has elected, will assume a jurisdiction over the fund, or the security which the creditor has not selected, and deal with that in favour of a creditor who might have obtained the other fund but for the selection. I agree with this proposition, dating it to commence when *Heaton* placed his execution in the sheriff's hands, by which the goods were bound, but incapable of being acted upon until the goods were sold; and now let us see whether the present case is one in which to apply it.

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Morgan, it seems, was largely indebted to various persons, and among others, to all the parties to this suit. *Heaton*, in order to protect himself, had not only obtained a confession of judgment from *Morgan*, but had also on the 22nd of March, 1855, obtained from him a bill of sale transferring notes, book debts, and securities. On the 30th of March *Heaton* placed an execution, sued out upon the judgment, in the sheriff's hands against *Morgan's* goods and chattels. Other persons followed with executions, and the appellant's and respondent's executions came to the hands of the sheriff on the same day, viz., the 4th of April, though the respondent's execution appears to have preceded that of the appellant. The judgment obtained by the respondent was upon a confession, and probably the other was also. It seems the goods were not sufficient to satisfy the different executions anterior to that of the respondent, and consequently there was a great anxiety on the part of the appellant, and also of the respondent, that some arrangement and understanding should be come to and adopted between all the parties interested, by which *Morgan's* property could be turned to the best advantage to satisfy the debts. In pursuance of this desire, *Morgan*, on the 27th of April, 1855, made over all his stock in trade, merchandise, &c., together with his book debts, notes, securities, &c., which *Heaton* then held, to the appellant, the respondent, and *Brown*. It seems the understanding then was, though not put into the writing, that the sheriff should transfer the goods to some person who

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should furnish endorsed promissory notes, and that the payment of these notes should furnish the funds to pay off the different executions; *Heaton* being the first and largest creditor consenting to this arrangement. According to the understanding these notes were to be endorsed by *Joseph* and *Brown* and by *Topping*. This arrangement fell through, and subsequently, for the reasons which I shall hereafter give, the respondent dissented from the arrangement which *Morgan*, *Brown* and *Topping* had made on the 7th of April. On the 20th of April the parties, leaving out *Joseph*, came to another arrangement, and by an instrument of that date *Heaton* covenanted that the sheriff might sell the goods, and if they should be purchased by *Topping*, that he (*Heaton*) would accept *Topping's* promissory notes for his debt, and would assign over to *Topping* the securities which he (*Heaton*) held. To carry out this new arrangement the sheriff, on the 21st of May, sold the goods to *VanBrocklin*, also a judgment creditor, upon the understanding that he should again re-sell and pay the executions. This was done with the consent of *Heaton*. The sheriff then returned *Heaton's* execution as satisfied, *VanBrocklin's* as satisfied in part, and as to the residue, and all the other executions, *nulla bona*. On the 23rd of May *Morgan* transferred and assigned all the securities to *Topping* and *Brown*, in satisfaction of their debts, he having by an endorsement on the instrument of the 20th of April, consented that *Heaton* might transfer them. After *VanBrocklin* purchased the goods, he, together with *Topping*, became responsible to the creditors, and *VanBrocklin* was constituted agent to collect the securities so transferred by *Morgan* and *Heaton*. The respondent on the 19th of May, through his solicitor, notified *Heaton* by post that he intended to resort to the equitable claim set up in this suit; and also notified the sheriff before he had made any appropriations of the proceeds of the sale of the goods to the same effect.

This narration is a plain statement of the facts, with

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the exception of one or two connected with the conduct of the respondent, which I shall mention presently, as bearing upon the view I entertain of it, and upon these facts the court below has decreed that the respondent is entitled to the securities so held by *Heaton*, subject to whatever balance may be due to *VanBroeklin* in respect of his judgment, in priority over the appellant.

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I do not see that the notices given on the 19th of May, by the respondent, of his intention to claim the equity now sought, places him in the position of being entitled to claim the exclusive right to the securities in question, and the court below thought so. The ground for giving the respondent that priority must rest upon the fact that his execution was placed in the sheriff's hands some few minutes before that of the appellant, and the question is, whether that is sufficient in this case.

The securities so held by *Heaton* were not in any way subject to any of the executions then in the sheriff's hands, and would not have been, even though the execution debtor had then held them himself, for it is only since that time that the legislature has subjected assets such as securities to execution. As respects the goods which the sheriff had seized, they of course were legal assets liable to the creditors, and the sheriff would pay the proceeds of them according to the legal priority of the writs, and if it were necessary for a court of equity to administer those assets, the same rule would be observed. The securities in *Heaton's* hands could only be treated, even *quoad* his own execution, as equitable assets. He held them by a legal title, it is true, and could apply them legally towards satisfaction of his debt, but his execution formed no lien upon them, any more than the executions of the other creditors. The deed of 22nd of March expresses that *Heaton* was to enjoy the subject matter assigned for ever, to and for the uses, intents, and purposes mentioned therein.

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No doubt *Heaton* could exercise a choice whether to apply those securities in satisfaction of his debt; or proceed to sell the goods upon the execution, but he could not be compelled to elect. If he had elected to take the securities, then as respects the respondent's execution, he would of course have been let in upon the goods, but I do not see that in equity *Heaton* was in conscience bound to take that course; and if there was no rule of equity obliging him to adopt a course which would, had it been otherwise, have given the other creditors legal rights, I cannot see why legal rights are to be preserved upon purely equitable assets, so as to give the respondent a priority. Suppose, while all the executions were in the hands of the sheriff, that *Morgan* had paid *Heaton's* judgment, he would have been entitled himself to the securities, for the other writs of execution formed no charge upon them. The same result, I think, must follow, where the goods have been sold to pay the debt; and then by that act what arises and springs from it is, that instead of *Morgan* being entitled to the pledges being returned to him, his judgment creditors become in equity entitled to have those securities made available for their debts. They are purely equitable assets in *Heaton's* hands, and as such each and every judgment creditor, as it appears to me, stands upon an equal footing to be subrogated in his place, and there is no priority.

The general rule in marshalling is, that actual incumbrancers operating *in rem*, whether legal or equitable, are payable according to priority; but in this case neither the appellant nor the respondent had any incumbrance whatever upon the securities in question while in *Heaton's* hands. *Heaton* had an incumbrance upon them by virtue of the deed, until his debt was satisfied, and when that was done, he then became a trustee of those securities for some one else. If no one intervened between *Morgan* and himself, then he held them upon trust for

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Morgan's benefit, and *Morgan* could call for them; but *Morgan's* judgment creditors intervene and say they have exhausted their remedy at law, because their writs of execution have been returned *nulla bona*, and finding that his trustee has certain demands to which he has an equitable title, they call upon him to account to them instead of to *Morgan*, on the principle that if the trustee had paid himself out of the trust property, they would have been enabled to make good their demands at law. As I have already said, I admit the general doctrine, but I am not of opinion that any priority exists, for I think the same rule ought to prevail which would in a case of bankruptcy. None of the creditors had any specific lien on these securities—no specific incumbrance existed upon them, giving one prior claim to another, that is, after satisfaction of *Heaton's* demand. I refer to *Morrice v. The Bank of England*, (a) *Simmons v. Simmons*, (b) *Wilson v. Fielding*, (c) *Deg v. Deg*. (d) The case of the creditors of Sir C. Cox, (e) *Turner v. Turner*, (f) *Clay v. Willis*, (g) and the 27th and 28th chapters of *Ram* on Assets.

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According to this view the decree is too large, because I think the equities between the parties to this appeal are equal, and both would, if nothing else stood in the way, be entitled to the securities in proportion to their respective debts.

But it now remains to be enquired into, whether the respondent has in truth such an equity as against the appellant, or whether his conduct has not deprived him of being now remitted to that position, on the ground of the rule that he who comes for equity, should himself have acted equitably. To determine this the facts of the case must be analyzed. *Heaton* had

(a) Cas. Tem. Talbot 220; 8 Swans. 574; Foly's case, 2 Freem. 49, and 2 Eq. Cas. Abr. 459.

(b) 2 Freem. 274.

(d) 2 P. Wms. 412.

(f) 1 J. & W. 39.

(g) 1 B. & C. 364; Spence Eq. Jur. 583, 4.

(c) 2 Ver. 763, and 10 Mod. 426.

(e) 3 P. Wms. 341.

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an execution against *Morgan's* goods, which none of *Morgan's* creditors could displace, and he also held certain securities which he was not bound by any rule of law or equity to apply to the liquidation of his debt. The other execution creditors had no legal incumbrance upon the securities; they had only an equitable right to those equitable assets in the event, and when the event happened, of *Heaton* absorbing the legal assets, and that right, as I think, would be to have them administered *pari passu*. Before the event arose which would call that right into existence, viz., on the 7th April, the debtor made an arrangement with *Brown*, in respect of his, the debtor's affairs, and by deed transferred to *Joseph*, *Brown*, and *Topping* all his goods and the securities in question. The deed does not express the arrangement, which was understood to have been settled, of the terms upon which the three were to take the goods and securities, but the evidence supplies that. Nothing is said about priority of executions, or of the proportions to be applied, in respect of their demands; but I apprehend the legal effect of this instrument, as between themselves, *Joseph*, *Brown*, and *Topping*, in case there should be a deficiency in satisfying their demands, after discharging the demands of those who had a prior right, and who were not parties to taking the goods and securities in satisfaction, would be, that it should be shared in proportionally, and according to their respective debts, and not according to priority of time, in placing the executions in the hands of the sheriff. *Joseph* never saw this deed, and he says he only knew of its contents after *Brown* returned from Brantford, which was a day or two after the 7th April, and he represents that *Brown* informed him that it gave them a preference over *Topping*. This arrangement of the 7th April was broken up, and, so far as *Topping* is concerned, it is material to enquire why it was broken up, and whose fault it was. The respondent wishes us to understand the fault lay with his partner, *Brown*, who either then had become, or was becoming, a partner with the appellant, and that these

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two were, with the assistance of *Morgan* and *Heaton*, or of one of them, colluding together to give every thing to the appellant, and deprive the respondent of his debt. If that were true, as a consequence, *Brown* must be a loser, to the extent of half of the partnership demand; but upon a careful perusal of the evidence and correspondence, there seems, in truth, nothing to warrant the conclusion of any such combination against the respondent, or that the arrangement was broken off from any such idea. Then, upon the evidence, we are left to examine the respondent's conduct, and herein two things present themselves for consideration; first, whether between the 7th April, and the 17th, when the respondent wrote to *Heaton*, he had obtained any new light upon the subject of the non-priority of his and *Brown's* execution over *Topping's*, by the deed of the 7th April, or, secondly, whether he repented of, or did not wish to carry out the arrangement which *Brown* had made, viz., that the goods should be sold to some person, on credit, and that notes should be taken, to be endorsed by *Joseph & Brown*, and *Topping*, to satisfy *Heaton*, and the others.

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We see, from the evidence of *Brown*, that the respondent and the appellant had a quarrel, but what it was about we are not informed. It would have been material to the question before us to know whether that quarrel had a relation to the position of the writs then in the sheriff's hands. *Joseph*, in his evidence, says that *Topping* proposed a second assignment, after that of the 7th April, but he objected to it, and he further tells us, that he never repudiated the first, and would now be satisfied with it, if it gave him and *Brown* a preference over *Topping*. As I have already said, the procuration from *Morgan* of the deed of the 7th April, was but part of the arrangement entered into with *Morgan*. The debts due *Heaton*, and the other executions previous to that of *Joseph & Brown*, were to be provided for before the property under the deed could become available to the

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three persons to whom made, and, according to the understanding then existing, *Heaton* was to be settled with by notes, endorsed as I have stated. How far *Joseph*, *Brown*, and *Topping* had then confidence in each other, or what were the points of dispute does not appear, but when *Joseph* wrote the letter of the 17th April to *Heaton*, I think it was impossible for either *Heaton* or *Morgan* to suppose that the arrangement of the 7th April was any longer to exist. *Joseph* informs *Heaton* that he understood it was arranged by *Brown* that the firm of *Joseph & Brown* would become liable for the amount due him by *Morgan*, and tells him plainly that he has no intention of assuming such a liability. *Heaton*, after that information, could only go on and enforce his execution, unless some new arrangement were come to. As neither of the three persons had executed the deed of the 7th of April, of course *Morgan* could only look upon the repudiation of one part of the arrangement as making an end of the whole. The letter of *Brown*, of the 18th April, signed by the name of the firm of *Joseph & Brown* appears, then, natural enough, as neither *Brown* nor *Topping* wished to repudiate the arrangement, on the contrary, they wished it to be carried out. *Morgan* assented to it, and *Heaton* covenanted that, in case the goods were purchased at sheriff's sale, by *Topping*, he would assign to *Topping* all the securities.

Judgment.

The sheriff's sale took place on the 21st May, and the second assignment, as it is called, was made for the purpose of carrying out the previous arrangement of the 20th April. If it were necessary to hold that the arrangement of the 20th April was, in fact, though not exactly, carried out according to the letter of it, on the deed of the 23rd May, an appropriation of the securities by *Heaton* and *Morgan*, before any notice given not to appropriate them, I do not think, under all the circumstances of this case, I should feel myself much pressed; but, viewing the conduct of *Joseph* as I do, I think he defeated the arrangement of the 7th April, and I feel it more satisfactory to

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rest upon that ground. I do not mean to be understood as stating that *Joseph* had not a legal right to refuse to assume the liability which was imposed upon him by his partner, in the arrangement made with *Morgan* and *Heaton*, but what I find fault with is, claiming to have one part of the arrangement of the 7th April carried out, and yet repudiating the other part. He supposed that under that arrangement, he had a preference over *Topping*, and if he could hold to that assignment made by *Morgan*, without the firm of *Joseph & Brown* assuming any liability to *Heaton*, of course it would be a great point gained. And that would apply to these securities, for the deed of the 7th April embraced them. That deed being put an end to, the parties were left where they were, and on the 20th April a new understanding was come to, under which *Topping* became entitled to the securities.

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be levelled against his partner, and not against *Topping*, for *Topping* was willing to have shared the securities with *Joseph*, which it seems *Joseph* was unwilling to do. When the first arrangement fell through, then *Topping*, as it seems to me, was at perfect liberty to make any arrangement he could with the debtor, in order to obtain the best satisfaction he could, and under all the circumstances, I think it would be inequitable to take from him any advantage he has gained through the good will of the debtor, and give it to one who thwarted what, according to the evidence, would have been a very fair arrangement for the disposition of the goods profitably, which was made in the first instance.

No lien existed upon those securities in *Heaton's* hands whatever, in favour of either the appellant or respondent, and no equity arose in favour of either until the goods were sold by the sheriff. I look upon the facts of the case as establishing that in the meantime a disposition of those securities had been made by the

1859. debtor and the creditor *Heaton*, who held them consequent upon the sheriff's sale of the goods, and that the deed of of 28rd of May was but perfecting the matter, and I think the parties were at liberty to do that.

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The bill, I think, should have been dismissed.

SPRAGGE, V. C.—The fund for which the defendant is made answerable by the decree of the Court of Chancery is not assets in the proper sense of the term; though I allow that it is of such a nature that if assets at all, it would be assets strictly equitable.

I think the question admits of considerable doubt, for the right of the plaintiff to the fund is purely equitable, what may be called a creature of the court of equity; and two maxims of the court may be invoked in aid of ratable distribution among the creditors; one, that he who comes into equity must do equity; the other, that equality is equity; a court of equity regarding all debts in conscience as equal, and equally entitled to be paid.

Judgment.

But, on the other hand, the creditors had legal rights upon another fund, for which the fund got at through the intervention of equity is the substitute; the fund available at law was withdrawn from the creditors by another creditor, in the exercise of his strict legal right. He had the option at law to pay himself out of either fund; if he had elected to pay himself out of the fund not common to both, the creditors would have been paid out of the other fund—the goods of the debtor—according to their priorities; having elected to pay himself out of the goods, the equitable doctrine, as I understand it is, that the creditors thus disappointed stand as to the fund out of which the prior creditor might have satisfied his debt, in the same position *pro tanto* as the prior creditor; they are subrogated to his rights.

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in the same position as to the substituted fund, or in a different position? I am inclined to think that the principle upon which equity proceeds is to rectify for the benefit of subsequent creditors what has been done by the prior creditor; and that it may well and properly stop there. If it does more, and exacts as the price of granting relief that the substituted fund shall be distributed rateably, it does something more than subrogate the body of creditors to the rights of the prior creditor; and I think something different. I cannot but think that the true result of the principle upon which the court proceeds, would be to give the creditors, disappointed by the act of the prior creditor of their remedy upon the one fund, the same rights against the other fund to which he might have resorted.

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The case of *Wilson v. Fielding* is not an authority for a rateable distribution in this case. It was strictly a case of assets, and Lord *Macclesfield* in adjudging that the judgment creditor should take *pari passu* with the simple contract creditors, went expressly upon the ground that the judgment had been recovered since the death of the testator, and so far as appeared, voluntarily on the part of the executor.

Judgment.

HAGARTY, J.—The facts of this case seem unlike any other that I have met with. Until *Heaton* placed his writ in the sheriff's hands, thereby binding certain goods and chattels not affected by his prior security, no equity existed to interfere with him. He lawfully obtained payment of his claim by this writ. He then held the book debts and other property included in the assignment, as trustee, to re-assign to *Morgan* or his appointee, the purpose of the original assignment being satisfied. *Joseph* had placed his writ in the sheriff's hands on the same day as *Topping*, but at an earlier hour. Neither of these writs had any legal power over the property assigned to *Heaton*. *Morgan*, the debtor, after the issue of these writs, with the full assent of

1859. *Joseph's* co-partner *Brown*, assigns the property assigned to *Heaton*, to *Joseph & Brown*, and to *Topping*, for joint benefit, without preference. The respondent afterwards, as it appears to me, because he was advised that he could obtain priority over the property assigned to *Heaton*, refused to abide by this assignment, and sometime after a different assignment is made, by which *Topping* obtains priority over him. I assume that all the parties were fully aware of their respective claims. I have in vain sought for any authority to warrant my holding that *Joseph*, by issuing his *fi. fa.* an hour before *Topping*, obtained any advantage whatever, except over property legally bound by his writ. I concede that he, as a judgment creditor, may have had the right to the aid of a court of equity to obtain the benefit of this personal property to which, in the state of the law in 1855, his execution did not apply. But I do not see why such assistance should be given to him, to place him in any better position than any other creditor of equal right, whose writ happened to be delivered a few minutes later to the sheriff.

Judgment.

Equality in such a case would seem to me to be the highest equity, and in the absence of clear authority I cannot consider it right to give Mr. *Joseph* any priority. He had such priority by express law as to all property bound by a writ of *fi. fa.* There is other property beyond the reach of his writ, and he has to ask the court to enable him to reach it. I admit that the weight of modern authority shews such property as that assigned to *Heaton*, to be legal rather than equitable assets, although the aid of equity be required to charge it. But I think that all judgment creditors who had obtained executions should equally participate in the fund.

I do not see any satisfactory evidence that (at all events as regards the first assignment) *Brown* was acting in fraud of his co-partner *Joseph*.

To support the decree, I must hold that where there

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are several judgment creditors with executions in the sheriff's hands, and all desirous of reaching a fund held by a prior execution creditor who had been paid by exhausting the seizable chattels, that in making that fund available the court will expressly substitute the fund for the chattels so seized, and thus allow the creditor whose execution first reached the sheriff's hands to be paid in full to the exclusion of other judgment creditors, possibly earlier in date of recovery to him, whom accident may have left a few yards behind in the race to the sheriff's office. Finding no authority to warrant such a dealing with a fund not bound in any way by the executions, I feel most unwilling to make a precedent in favour of a creditor like the present respondent.

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The alterations in the statute law since 1855 may possibly prevent the recurrence of such difficulties. But I think the plaintiff fails in shewing himself entitled to any of the relief prayed for in his bill. I repeat that I see no evidence of fraud on *Brown's* part in obtaining the first assignment. He may have misrepresented the effect of that assignment to *Joseph* on his return to Toronto. He swears on his examination that he never repudiated the first assignment.

Judgment.

I find an assignment, as far as I can see, fairly taken from *Morgan* to *Topping*, jointly with *Joseph & Brown*, the latter representing his firm in acceding to a very just arrangement. The whole difficulty seems created by *Joseph* afterwards determining to resort to his right of marshalling the assets, and ignoring the assignments altogether. I think he did so clearly with the idea that by his giving the notice set forth in his bill, he could obtain priority over *Topping* and the others in the fund. For the reasons already stated, I think he fails in gaining such priority. He does not ask to set up or obtain the benefit of the first assignment, but rests wholly on his supposed vantage ground.

I think his bill should be dismissed as to *Topping*, the

1859. only appellant, but, under all the circumstances disclosed, without costs. Had the defendants *Heaton*, *Van Brocklin*, or *Morgan* appealed, the bill should have been dismissed as to them with costs.

Topping
Joseph.

Subsequently, and on the 4th of September, 1861, *Heaton* moved for and obtained from the Court of Chancery an order allowing him to appeal from the decree, notwithstanding the time within which, according to the practice of the court, he should do so had elapsed. As the case has never been brought on again by way of appeal, it is believed that the parties arranged the matter out of court.

[Before the Hon. J. B. Robinson, Chief Justice; the Hon. J. B. Macaulay, C. J., C. P.; the Hon. W. H. Blake, Chancellor; the Hon. Mr. Justice McLean,* the Hon. Vice-Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; and the Hon. Mr. Justice Richards.]

[ON AN APPEAL FROM THE COURT OF COMMON PLEAS.]

BRUNSKILL V. HARRIS.

1854.

Pew-holder—Church-wardens—Disturbance.

The church of St. J., having been destroyed by fire, it was agreed that pew-holders who had purchased the right to their pews, subject to a ground rent, should pay a certain sum, and be reinstated as nearly as circumstances would permit in their pews in a new church, to be built on the site of that destroyed. After the new church was built one of such pew-holders refused to pay a sum of £25, agreed to be subscribed by him towards re-building the church, and for which he had given his promissory note, whereupon the church-wardens, acting in pursuance of a resolution of the vestry, removed the door from the pew claimed by him, and the holder thereof instituted an action on the case against the church-wardens for disturbance of his easement. *Held*, affirming the decision of the court below, that he was not entitled to recover. [MACAULAY, C. J., and BURNS, J., dissenting.]

This was an action of trespass on the case, instituted

* Was absent when judgment was delivered.

in the court below, by *Thomas Brunskill*, against *Thomas Dennie Harris* and *Clarke Gamble*. The declaration states that the plaintiff before and at the time when, &c., was and thence and still is a member of the Church of England, and a *pew-holder* according to the form of the statute, in the church of St. James, in Toronto, in the county of York, the same church having been all the time aforesaid, and still being of the communion of the United Church of England and Ireland in Upper Canada, and the plaintiff was during all the time aforesaid and still is in the rightful *possession* of *such pew*, as *such pew-holder*, and by reason thereof he during all the time aforesaid, until the time of committing the grievances after-mentioned, had, and still of right ought to have for himself and family, the right use and benefit of the said pew in the said church, that is to say, that certain pew known and called No. 21, in the eastern gallery of the said church, to hear and attend divine service celebrated therein. Yet defendants well knowing the premises, &c., to wit, on the 1st of August, 1853, and on divers other days and times between that day and the commencement of this suit, unlawfully, and without the leave and license, and against the will of the plaintiff, entered into the said pew, and took, removed and carried away the door of the same; then and there being upon and belonging and affixed to the said pew as a part thereof, and so kept the said door removed from the said pew during the time aforesaid, and during the celebration of divine service in the said church, and thereby greatly injured the said pew, and disturbed the plaintiff in the enjoyment thereof, &c., in so full and ample a manner, &c., to the damage of the said plaintiff, &c.

1854.


 Brunskill
 v.
 Harris.

Judgment.

The defendants plead jointly, 1st, that they are not nor is either of them guilty of, &c.

2nd. That the plaintiff was not at the said times when, &c., *possessed* of the said pew in the declaration mentioned, as *such pew-holder*, in manner and form alleged.

1854. 3rd. That the plaintiff at the said times when, &c.,
 Brunakill had not, nor of right ought to have had, the right use of
 v. Harris. or benefit of the said pew in the manner and form
 alleged.

4th. That the plaintiff was not at the said time
 when, &c., a pew-holder in the church of St. James, in
 Toronto, in manner and form alleged.

Each of the pleas concluded to the country, and the
 plaintiff joined issue by adding similiter.

Statement.

The cause was tried before the Hon. Mr. Justice
Richards, at the Toronto assizes; and from the notes
 taken at the trial it appeared that the plaintiff produced
 in evidence an indenture made the 1st of December, 1842,
 between the Honourable and Right Reverend *John*, Lord
 Bishop of Toronto, residing in the city of Toronto, in
 Canada, the Rector of Toronto, and *Clarke Gamble*, and
Thomas Dennie Harris, of the said city of Toronto, church-
 wardens of the church of St. James, in Toronto, afore-
 said, of the first part, and *George B. Willard*, of the
 same place, &c., of the 2nd part, whereby after reciting
 the provincial statute, 3 Vic., ch. 74, to make provision
 for the management of the temporalities of the United
 Church of England and Ireland in this province,
 and that the said *Gamble* and *Harris* were on the 28th
 of March, then last past, being Easter Monday, accord-
 ing to the provisions of the said act, duly appointed
 Church-wardens of said church of St. James, for the
 year next ensuing, and that the said *Willard* had become
 the purchaser of the pew No. 21, situated in the eastern
 gallery of the said church of St. James, at the price
 of £40, which said pew was subject to an annual
 ground-rent or yearly charge of £2 10s., rated and
 assessed thereon according to the provisions of the said
 act, at a vestry meeting called for that special purpose,
 and held in the said church of St. James, on the 10th
 of July then last past. The said parties of the first

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part, in pursuance of the powers in them vested by the said act, and in consideration of the premises and of the sum of, &c., which was thereby acknowledged, granted, bargained, and sold unto the said party of the second part, his heirs and assigns for ever, all and singular that certain pew above named, being No. 21, &c., together with all privileges and appurtenances, unto the said party of the second part, his heirs and assigns, to and for his and their sole benefit, use, and behoof for ever, subject to the aforesaid ground-rent of £2 10s., payable half-yearly, on the 1st of January and July, in each year, with a covenant by *Willard* to pay the same, to the parties of the first part, or their successors, &c.

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v.
Harris.

By deed-poll dated the 9th of June, 1843, executed by *Willard*, and endorsed on the said indenture, *Willard*, in consideration of £39 10s., granted, bargained, sold, assigned, transferred, and made over to the plaintiff, his heirs and assigns for ever, all and singular, the said pew and church privilege, subject to the provisions, conditions, and agreements, in the said indenture contained, &c., to hold, to the plaintiff, his heirs and assigns, to the sole and only use of him, his heirs and assigns for ever.

Statement.

The execution of the aforesaid indenture and assignment was admitted.

The plaintiff also produced a receipt from the defendant *Harris*, dated Toronto, February 27, 1853, for £13 6s. 8d., from the plaintiff, being the 1st, 2nd, and 3rd instalments on one-third of his pew in the church of St. James. Also a letter dated Toronto, 14th of June, from the defendants to the plaintiff, requesting him to have the kindness to send them his cheque on or before Saturday (then) next, for £25, as per account rendered, and adding that it would be exceedingly painful to be compelled to carry into execution the order of the late vestry meeting with reference to the undischarged claim of the church.

1864.
Brunskill
v.
Harris.

The evidence further shewed that the door was on the pew two or three weeks before the church was opened for divine service. That an upholsterer having been employed by the plaintiff to cushion and carpet his pew, a journey-man applied to the defendant *Harris* for the number of the plaintiff's pew and others, which he was about to fit up, and from *Harris* received the numbers, including that of the plaintiff; he (*Harris*) being aware of the object; that the pew in question was thus furnished, apparently before the opening of the church, and while the pew door was on; that the church was opened on Sunday, the 19th of June, previous to which the pew door had been removed, and it was off on that day and following Sunday. There was evidence to shew that the door had been so removed by the directions of the defendants in consequence of the non-payment of the plaintiff's subscription of £25 towards re-building the church.

Statement.

On Monday, the 20th of June, the plaintiff addressed a note to the defendant *Harris*, desiring to know by whom, or by whose order, and for what reason, the door of his pew had been removed; in answer to which Mr. *Harris* wrote, that the reason of the pew door having been taken off was, that the plaintiff's subscription of £25 had not been paid.

The pew door had been re-placed before the trial.

It further appeared that the present edifice is not on the same ground as the former one, and is eight feet longer; that it was agreed at a meeting of the vestry that the former pew-holders should have the corresponding pews in the new church, on paying one-third of the original price of their pews; that the new pews corresponded with the old ones as to numbers and position as near as might be, and that it was understood that when the proprietors of the old pews took out their deeds and paid the notes which had been given for one-third, they

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(a) 1 T. B.
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were to take possession of their seats, and continue to hold them. 1854.

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v.
Harris.

On the part of the defendants it was objected that the only evidence of ownership the plaintiff could give was by deed or lease of the pew in the present building, and that the plaintiff did not shew a rightful possession of the pew in which he complained of the defendants disturbing him.

The jury were directed to find for the plaintiff, and assess damages, which they did, at 1s., subject to the opinion of the court whether the plaintiff was entitled to recover under the evidence, and in Michaelmas Term, 17 Victoria, (1853,) a rule calling upon the defendants to shew cause why the postea should not be delivered to the plaintiff, was obtained, which upon argument was discharged. Thereupon the plaintiff appealed to this court. On the appeal

Argument.

Mr. Wilson, Q. C., for the appellant, referred to *Stocks v. Booth*, (a) *Bryan v. Whistler*, (b) as shewing that an action on the case was the proper remedy for the injury complained of; that this was the proper form of action even if trespass could have been maintained, which, however, required a complete and distinct, not a subdivided possession, as is the case here.

The plaintiff's deed conferred a good title, and a right of ingress and egress at all times when the church was open, and not merely during the performance of divine service; and without disturbance at any time. *Spooner v. Brewster*, (c) *Wood v. Hewitt*. (d) He referred to the proof of the defendants having recognised the plaintiff's right, and contended that the plaintiff, on the pleadings was entitled to maintain the action both under the statute and also independently of it. *Roger's Eccl.*

(a) 1 T. R. 428.
(c) 3 Bing. 186.

(b) 8 B. & C. 288.
(d) 10 Jur. 390, S.C. 3 Q. B. 913.

1854. Law, 170, and title "Church." That possession was sufficient against wrong-doers; and the defendants do not justify as church-wardens, wherefore all plaintiff had to prove was that the defendants acted in derogation of his rights. That the pew was an easement in the church, not destructible, and whether in the gallery or on the main floor, could make no difference; that the building became affixed to the soil, and part of the estate or freehold, and the upper part equally with the lower, and likening it to a house of several stories, each flat owned by a different proprietor, submitted that the rights in the soil in respect of each proprietor's flat was not destroyed by a fire consuming the building, but that an interest in the subsoil would remain to support a new edifice; that in like manner a person might own a freehold interest in a church; that a freehold interest may be acquired and held in an incorporeal hereditament, and that if no galleries had been erected the plaintiff in respect of his easement would be entitled to an equal accommodation on the main floor. *Jones v. Ellis*, (a) *Andrews v. Adams*, (b) *Pettman v. Bridger*. (c) That separate from the plaintiff's right or easement, the materials forming or marking out the plaintiff's pew were chattels, and that the door was a portion thereof, in which the plaintiff had an interest in common with the sides and ends, and the defendants had no right to remove it to his annoyance.

Argument.

Mr. *Hagarty*, Q. C., for respondents. The evidence shews the defendants acted as church-wardens, and had taken the step complained of, because the plaintiff had not paid his subscription of £25.

The plaintiff shews no right: the easement acquired under the deed to *Willard* having ended when the former church was burnt, and did not revive. In England pew rights are appurtenant to messuages, and so may

(a) 2 Y. & J. 265.
(c) 1 Phil. 816.

(b) 15 Jur. 149.

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continue in renewed parish churches, but that here it depends upon conveyances under the statute, which vests the freehold in the rector and church-wardens, and from whom the plaintiff should have obtained a deed of the pew claimed in the new church, which is not identical with the pew that was destroyed.

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Harris.

The plaintiff could only succeed by proving three things: a deed, possession, and a disturbance; the first and last of which were not shewn, and possession alone is insufficient even if established.

To shew the distinction prevailing between the acquisition of such easement in England and here, he cited *Reynolds v. Monckton*, (a) *Worth v. Terrington*, (b) *Harris v. Drewe*, (c) *Pepper v. Barnard*, (d) *Morgan v. Curtis*. (e) He also contended that it is not the plaintiff's close, and if it is, being a corporeal interest under the statute, a freehold in possession, and not an easement, the action should have been trespass, not case. *Griffith v. Matthews*, (f) *Lousley v. Hayward*, (g) *Chitty's Pleading*, vol. 2, p. 817.

Argument.

That a pew need not be inclosed in the form of a box; or more than a seat or sitting, and that the mere removal of the door, as alleged, was no disturbance.

ROBINSON, C. J., read a judgment affirming the decision of the court below, and dismissing the appeal with costs.*

MACAULAY, C. J., remained of the opinion expressed by him in the court below.

(a) 2 Moo. & R. 384.

(c) 2 B. & Ad. 164.

(e) 3 M. & Ry. 389.

(g) 1 Y. & J. 583.

(b) 13 M. & W. 781.

(d) 7 Jur. 1128.

(f) 5 T. R. 296.

* Search has been made amongst his Lordship's papers for the manuscript, but it would appear that it had been delivered out at the time; and, on applying to the reporter of the Common Pleas, from whom the other judgments were obtained, that gentleman can find no trace of it. Should it at any future time be found, it will be printed as an appendix.—A. G.

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ESTEN, V. C.—I am perfectly clear that this action cannot be maintained. The acts proved to have been done by the rector and church-wardens might amount to a license, but then the act complained of would be a revocation of it, and could not support an action. The only ground, then, on which the action can be rested is, that the deed of 1842 operated as a conveyance of, or the grant of, an easement in a totally different subject from that comprised in it. The words are not prospective, applying to any corresponding pew in any new church, if such a prospective grant would be good, which is more than doubtful. It is quite impossible, I think, that the deed can have the effect contended for by the appellant; and therefore that the judgment of the court below should be affirmed, and the appeal dismissed with costs.

Judgment. BURNS, J.—I consider that the effect of our statute 3 Victoria, chapter 74, is to create a property as respects the freehold in pews in the church of a kind entirely peculiar; dependant, however, upon the principles which govern other species of property, so far as they can be made applicable to this species, which is, as I think, *sui generis*. The effect, as it appears to me, of enacting that a freehold interest in a pew may be purchased, while at the same time the freehold in the soil upon which the church stands is vested in the parson, and the possession of the soil and church is vested in the incumbent for the time being with the church-wardens, is, that it is an incorporeal hereditament, capable of descending and being transmitted by conveyance from one to another.

The answer to the objection that properly speaking an incorporeal hereditament is not the subject of a rent charge, is, that the statute has made pews subject to such rent charge as the vestry from time to time may decide upon. The enjoyment of this incorporeal hereditament must of course be consonant with the terms, and the end and object for which it is created and intended,

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and subject to such rules and regulations as is consistent with the laws applicable to property of this description. 1854.

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Harris.

In England the soil and freehold, and the church with it, is held by the parson to and for the uses of the parish, and no individual can obtain a right in a pew as a freehold interest, which may be sold and disposed of. Here, by our statute, the soil and freehold with the church is held, not for the uses of the parish, but to and for the uses of such persons as may have purchased pews, and others who may rent pews or sittings from the church-wardens. When a person purchases a pew he acquires something for which he gives a valuable consideration. He obtains no interest in the materials of which the building is constructed, or of those of which the pew is made. The nature of his interest is to occupy a certain space, to the exclusion of others at such times as it is proper the church be used for worship, and other ecclesiastical purposes. The space which he has purchased the exclusive right to occupy will be subject to such terms in the way of a rent charge as may be determined upon by the vestry from time to time. That rent, of course, is not a thing for which a distress can be made, but it may exist by contract, in which case the covenantor would be personally liable; or it may be enforced by excluding the purchaser in an ejectment for non-payment. Then is the destruction of the church or the re-building of it upon another or a different site, a destruction of the property which the purchaser has thus acquired?

Judgment.

First, is the destruction of the church a destruction of the right of a pew-holder who has purchased? I am of opinion that it is not. It seems to be admitted on all hands, if the church-wardens had a sufficient amount insured upon the church to enable them, in case of fire, to re-build, and did accordingly re-build, after destruction, that the rights of the pew-holders would remain as they were before. If that be so or if the pew-holder

1854. has some interest in the insurance money if there be an insurance, under what authority is it, or by what influence does the pew-holder claim that he be restored to a pew for the one he occupied before the destruction; or that he may have something to say respecting the insurance money? It can only be, as I apprehend, because he has purchased something for which he gave a valuable consideration, and that was a freehold interest in a particular locality. If the destruction of the building caused the destruction of his right, then his freehold was liable to be put an end to the next minute after he purchased it. One of the very objects of a rent charge upon pews may be to provide a fund to pay insurance, and knowing that to be so, a purchaser may give a larger price for a pew, because then he knows the means can be obtained from which to restore him, in case of casualty, to the occupancy of the locality which he buys. If an insurance be kept up from the fund provided by the pew-rents, then each pew-holder in that way contributes towards the restoration. That fund may or may not be sufficient to restore, but if it is not the principle which governs remains the same. If it be correct that a pew-holder has an interest in case the church be insured, then why should not his interest still remain when there is no insurance? The only difference is, that some other mode for restoration, in case of casualty, must be resorted to. It appears to me the very object of making the pews to be held subject to such terms in the way of rent as the vestry may decide upon, is that the expenses which may be necessary may be provided for. These expenses may be various, including the minister's salary, and a sufficient sum for repairs, under which head re-building after a fire would come. In case of leasing a pew, the rent might cease with the destruction of the building, but I apprehend a different rule would prevail in respect of one purchased in freehold, subject to a rent. The purchaser would, I think, be bound to pay the rent charge notwithstanding the destruction of the building. As I have said, the minister's

Judgment.

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salary may be provided for out of the fund from the pew-rents, but if the destruction of the building caused the right of the pew-holder to cease, of course the liability to pay rent would also end, and then there would be no means, from those holding in freehold to pay either the minister's salary, or to provide for restoring the building. If the right to a pew remained after the destruction of the church, it is clear to me that the liability to pay according to the terms agreed upon also remained. These rights and liabilities, I think, remain intact, and the only thing in abeyance is the use of the right in the way of occupation of the locality in the church so purchased, until the restoration.

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Harris.

Every vestry in prudence should decide the amount of the pew rents with a due and proper regard for casualties; and the incumbents and church-wardens in granting the faculties for pews should take care that the grant properly provides for future difficulties. If faculties have been granted without taking care of these things, that will not alter the law; all that can be said is, that the affairs of the particular church have not been prudently managed, or that the various interests have not been sufficiently guarded or provided for. I cannot imagine that in case of the destruction of the building, when the minister's salary is to be paid from pew-rents, his salary is to cease. It may be affected, it is true, when the pews were only leased and not sold, but then upon the church being restored the pews would all be in the incumbent and church-wardens, to be again disposed of.

Judgment.

In the case of a sale of the freehold interest, I take it that both parties deal upon the terms of mutuality; that is, that a certain privilege is granted on the one hand, not that it may last for an hour or a year according as a casualty may happen, but that it is a privilege to last for all time to come, and on the other hand the person accepting of the privilege comes under the liability

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Harris.

which runs with the privilege, and which liability, if prudently directed, will enable the privilege to be enjoyed at all times with as little interruption as possible. The interruption may be short, or it may be a long time, or it may be such as that the privilege can never again be enjoyed; but I do not see that any of these contingencies destroys the legal right to the privilege, that must remain, and whether it be a long time before things can be restored to a state in which the privilege can be again enjoyed, or whether it ever be done, is only a matter of prudent arrangement and management in the churchwardens and vestry. The destruction of the church does not in my opinion destroy the vestry. When I say destruction of the church, I mean the building, for the word church has a two-fold meaning. It is commonly used among laymen to signify the building, but is generally used also to signify the collective body of christians attached to a particular form of worship. The word is also applied to a congregation merely assembled in a private house. For an instance, see 4th chapter of Colossians, v. 15. If after the destruction of the building the congregation met, and continued together, no matter where it assembled, it would still be the church, and the vestry would remain, as before, and be elected by the pew-holders.

Judgment.

Secondly, will the erection of a new church on a different foundation from the one destroyed, prevent a pew-holder from having a pew assigned to him? I do not think it will. It seems to me that in holding the property to be an incorporeal hereditament decides this point. When the pew-holder purchased it, it is true he bought a particular locality, but then that is subject to the rights and interests of the whole body, and affected as to change of site, according as the vestry might determine. I do not understand that the purchaser is to be confined to a particular spot on the ground floor, or a particular spot in the air above, as in the gallery, because if so, that of necessity would compel a recon-

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struction of the building upon precisely the same spot. I treat the purchase as one of a privilege to occupy exclusively a particular place when the purchase is made, but liable to be shifted at an adjustment to be made when it is necessary to re-build. The freehold, as before remarked, is not in the materials of the church or of the pew. I think it is in the *right* to occupy a pew; that right when first purchased was indicated by a particular locality, which could be identified. So long as that identity existed the right, and freehold in the right, would be confined to that place, but when that identity was lost then an adjustment must take place. I do not think the vestry were bound to re-build precisely upon the same foundation. It might for many reasons be desirable to enlarge the building, and it might also be desirable to change the site, possibly it might, though I do not see why, be thought necessary to build of smaller dimensions than the original; or it might be thought better to construct two churches instead of one, and all these powers, I think, were vested in the vestry. Exercising the power of re-building in any of these ways, would not, as it appears to me, destroy the right of a pew-holder to have a pew. He could not of course select for himself, which pew he would have.

The churchwardens are declared to be as a corporation to represent the interests of the church and of the members thereof. The possession of the church is in them and the incumbent, and I apprehend it would be their duty to subdivide that possession among the pew-holders, according to their respective rights. If this be so, then it is obvious that if the church be reconstructed upon other ground, or if the church be smaller, or if there should be two instead of one, it would make no difference as regards such duty. What course it might be necessary to pursue in case there were a disagreement as to the adjustment of the pews, it is not necessary to say, for this case presents no difficulties of that kind. My idea is, that the freehold in the pew consists of the

1854. *right* to a pew, and viewing it in that light, I do not feel pressed with any difficulty about a change of the ground upon which the new building stands. The right will be confined, of course, as long as identity remains, but the want of identity, I do not think, destroys the right; after that is lost it is a matter of re-arrangement and adjustment to determine where the right shall attach, whenever circumstances have occurred which enable the right again to be claimed, and brought into operation for use. I do not see that any new faculty is required in order to exercise the right, the adjustment will settle that matter. Nor do I see that calling the space or locality in the restored building by any different name from what the former was designated, makes any difference. The right being, as I think, an incorporeal one, not dependent upon the materials of which the church and pew are composed, nor in the identical spot upon which the church at first stood, does, in my humble opinion, answer all the difficulties which may be raised. Possibly there may be cases in which it may be difficult to carry out my views fully, but that I consider would be a defect in a want of sufficient provisions in the law, and which in that respect may call for some alteration or amendment; but after the legislature has declared that the absolute purchase of a pew, (for which we may suppose a sufficiently valuable consideration was paid,) shall be construed as a freehold of inheritance, and may be bargained, sold, and assigned, I cannot bring my mind to believe that such property, as well as the consequences dependent upon it, such as the minister's salary, the constitution of the church vestry and other matters, all ended and became dissolved by the destruction of the property, or by its being changed in appearance, or in the site, by the decision of the majority of those having a voice in the matter.

*Brunskill
v.
Harris.*

Judgment.

Having defined what I consider to be the rights of a pew-holder, the question then is, whether the facts of the present case will enable the plaintiff to maintain an

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1854.

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v.
Harris,

action on the case for taking off the door of the pew which the plaintiff now claims to be his, in the new church. The first question is, whether he had such a possession as will entitle him to maintain any action? I think he had. Whether any adjustment in truth did take place, so that each pew-holder knew the locality upon which his right was to attach, has not been proved, but there is what I consider equivalent to it, so far as respects the plaintiff. It appears that the person whom he employed to cushion and carpet the pew applied to one of the defendants to know which it was, and he was informed. It appears also that plaintiff has occupied it since without any complaint made that he was occupying one not intended for him. The defendants, before the door was taken off, recognised that the pew in question was for the plaintiff, and do not question his right upon any other ground than non-payment of the sum claimed to be due; and in the very act of the door being taken off, it is done because the pew was recognised as being the plaintiff's. Whether he or his family had actually occupied it before the door was removed, I think of no consequence; the question is, had he the right to occupy. I think the defendants would not even question that right now, if the plaintiff had paid what was demanded of him. It is not a proper spirit certainly, after having subscribed towards the reconstruction of the church, not to make good the subscription because some difficulties may have arisen between the plaintiff and one of the church-wardens.

Judgment.

The faith of keeping good their subscriptions is not a matter between an individual and the church-wardens, but it rests with the body of subscribers, and it is unjust to them for individuals to recede from the subscription. That is a matter, however, beside the question of the legal rights of the parties. The second question, supposing the plaintiff to be sufficiently possessed of the pew, is, whether the act of the defendants is one injuring the pew, which will give him a right of action? I do not

1854.

Brook III
v.
Harris.

Judgment.

think the plaintiff could of his own will and pleasure fit up the pew as he liked; he must conform to such rules and regulations as may be established in that respect, and have the assent of the incumbent and church-wardens as to the manner of doing it. The incumbent and church-wardens, I take it, had authority in the matter of fitting up and decorating the pews of the church. They might have constructed them all without doors, or they might have made some with doors, and others without, and I apprehend the pew-holders would have no cause of complaint because the pews were not constructed to their liking. Here in the present case the pew was constructed according to a certain mode, and it had a door, and it was intended it should have one, and that it should remain if the plaintiff had paid the amount demanded of him. It may be said that the pew may as well be occupied without a door as with one, and that it is no injury to remove the door. In one sense that is so, but the question is, whether there be any right after a pew has been acquired and assigned to a person, to do an act which renders it different from all other pews, and makes it singular and to attract attention. I do not think there is any such right in the church-wardens. If they could take off the door of a pew because the subscription was not paid, then they could do so for any other matter connected with the church which the pew-holder refused to comply with. And if they have the power to remove a door in such a case, I see no reason why they would not have the same power in cases where parties had paid. All these powers, it seems to me, are to be exercised for the interests of the church and the members thereof. Now, if the vestry should by a majority resolve that the pews should have no doors, then no individual would in my opinion have a right to render his pew singular by keeping a door on it. The same principle operates in this case. By doors being put to the pews we must suppose it is with the assent of the majority, and the church-wardens have no right to render any of them singular without the assent

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of the proprietor. Doing an act which renders the pew singular from the others, and attracts attention, if done with the intention of pointing out the proprietor as standing in a different position from other members of the congregation, is in my opinion an injury. If the same act were done to render the church uniform, the case would be reversed, it would then be done to prevent individuals from making themselves singular. The injury consists in the intent, in a case like this. It appears to me, therefore, the action is well sustained.

1854.

Brunakill
v.
Harris.

The form of action being case instead of trespass, is, I think correct. Case is the only proper form of action for injuries to incorporeal rights.

For these reasons I think the judgment of the court below should be reversed, and the plaintiff be allowed to enter his judgment upon the verdict.

SPRAGGE, V. C.—I am not prepared to dissent from the judgment in which a majority of the court has concurred.

Judgment.

To a certain extent I am disposed to agree in the view taken in the learned and elaborate judgment of the Chief Justice of the Common Pleas in the court below; and if the present church of St. James had been built upon the site of the one destroyed by fire, with an arrangement of the pews corresponding with those destroyed, I should have felt difficulty in denying to the plaintiff his right to a pew in the new church, corresponding with the one in the building destroyed.

But dealing in this case with a matter of strict legal right, it lies upon the plaintiff to shew a title in law, an estate, in the identical pew, the disturbance in the possession of which is the subject of this action. The erection of the new church on a new site, different from that on which the former one stood, creates difficulties

1864.

Brunskill
v.
Harris

in the way of the legal right claimed, which I have been unable to overcome—this difficulty is a technical one merely, for if the new church is built partly from funds belonging to the pew-holders in the former church, and the residue by funds contributed rateably by the same pew-holders, of whom the plaintiff was one, there can be no ground in reason why the mere change of site should disentitle the plaintiff to a corresponding pew in the new church, when if the same site had been retained he would have been entitled. But to sustain this action he must have more than a right to be re-instated in his pew; he must have a legal estate in the pew; he may have the first, and be able to enforce that right, but I cannot follow the learned Chief Justice of the Common Pleas in his attempt to establish the second.

Judgment.

On the other hand there is much in the circumstances under which churches are built in this country, to favour the idea that the right acquired in a pew by absolute purchase is no more than a right to that pew as long as the building in which the pew is situated may last. The vestry is constituted in relation to the building, and not as in England, of the rate-payers of a parish. Again, the soil and freehold of the site of the church are in the incumbent. He is a trustee, and the *cestuis qui trustent*, I apprehend, are not only the pew-holders of such church as may happen to be on the ground, but of all members of the church in the locality. Take the case of a church which had become altogether inadequate to the accommodation of an increased population, and such a church becoming ruinous or destroyed, it would be difficult, I apprehend, to deny to the whole body of the churchmen of the locality a right to erect a suitable church upon the ground reserved and set apart for the erection of a church, and I do not see how such right could be overridden by the body of individuals who had been pew-holders in the old church. If the preferable right were with such pew-holders, I am not sure that it would not be a denial of the right of the whole body of the congregation, in favour of a portion of that body.

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But however this may be, I have been unable to see the legal right of the plaintiff in the pew in question, which is necessary to support this action.

1854.

Brunskill
v.
Harris.

With regard to moneys received from the insurance of the church building, destroyed by fire, it is one question who may be entitled to the benefit of such moneys, and quite another question whether they give any right to those entitled to them, to have them applied in the reconstruction of precisely such a church as the one destroyed; and even if they conferred such right, there would still remain the question whether such a right carried with it a legal title to pews in the newly-erected church.

Judgment.

[Before the Hon. Sir J. B. Robinson, Bart., C. J.; the Hon. W. H. Draper, C. B., C. J., C. P.; the Hon. Mr. Justice McLean; the Hon. Vice-Chancellor Esten; the Hon. Mr. Justice Burns; the Hon. Vice-Chancellor Spragge; the Hon. Mr. Justice Richards; and the Hon. Mr. Justice Hagarty.]

[ON AN APPEAL FROM THE COURT OF COMMON PLEAS.]

CARROLL V. POTTER.

Attachment against absconding debtor—Execution sued out in action not commenced by summons.

Held, affirming the judgment of the court below, that a writ of execution against the goods of an absconding debtor, issued upon a judgment entered up prior to his absconding, was entitled to priority over writs of attachment placed in the sheriff's hands before such execution; notwithstanding the judgment upon which it had been sued out, was entered up upon a cognovit in a cause in which no process had been served or executed before the suing out of the writs of attachment.*

[Sir J. B. ROBINSON, Bart., C. J.; McLEAN, J., and SPRAGGE, V. C., dissenting.]

The facts of this case appear in the judgment, and in the report of the case in the court below (reported in 9 Com. Pleas, 442.)

* The facts out of which this action arose, took place prior to the passing of the stat., 22 Vic., ch. 96, the 18th section of which renders a confession of judgment, given under the circumstances appearing in this case, void as against creditors.

1808.

Cassell
v.
Dobson.

From the judgment there reported the defendant appealed, alleging as grounds of appeal,

1st.—That there was no evidence that the appellant levied the moneys directed by the writ of *feri facias* to be levied, the evidence at the most only showing that there were goods out of which the appellant could have levied.

2nd.—That there were no goods out of which the appellant could have levied the said moneys, the same being exhausted by the writs of attachment filed with the appellant on the seventh day of August, 1858, and the other attachments filed and proved on the trial.

3rd.—That such attachments were entitled to priority over the respondent's execution; that the seizure under the executions made on the 6th of August, 1858, enured to the benefit of the attaching creditors the instant the first attachment was lodged, and that no actual seizure under, or specific appropriation of the effects of *Pickle* to such attachments was necessary; that if the same was necessary, the goods, though in the custody of the law, were in such custody for the purposes of the law, and could be so seized or appropriated; and the evidence showed that such seizure or appropriation was made.

4th.—That the plaintiff's execution was not entitled to priority under section 21 of 22 Vic., cap. 25, (Con. Stat.,) he not having served or executed process therein before the suing out of the writ of attachment, his judgment being founded on a confession, without process.

Mr. *Freeman*, Q. C., and Mr. *Anderson*, for the appellant.

Mr. *Harrison* and Mr. *Wood*, for the respondents.

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Lane v. Hooper, (a) *Belcher v. Patten*, (b) *Payne v. Drew*, (c) *Clark v. Mallory*, (d) *Aldred v. Constable*, (e) *Beekman v. Jarvis*, (f) were, in addition to the cases referred to in the court below, cited and commented on by counsel.

1860.
Carroll
v.
Potter.

The points relied on by counsel appear in the judgment.

SIR J. B. ROBINSON, BART., C. J.—The plaintiff sues the defendant, sheriff of the county of Oxford, for making a false return to a *fi. fa.* against goods on a judgment obtained by plaintiff against one *Charles Pickle*.

The declaration contains two counts. The first alleges that the defendant made the money endorsed on the writ, and yet falsely returned *nulla bona*, and paid nothing to the plaintiff. The 2nd count charges the defendant with neglecting to levy though *Pickle* had goods sufficient to satisfy the execution. Judgment.

The defendant pleaded 1st, not, guilty. 2nd. That he did not, under the said execution, levy the moneys on *Pickle's* goods, as alleged in the first count. 3rdly, to the second count, that there was not at any time during the period in that count mentioned, to wit, from the delivery to him of the plaintiff's *fi. fa.* till the return thereof any goods of the said *Charles Pickle*, within the defendant's bailiwick, whereof the defendant had notice, or could, or might, or ought to have levied the said moneys so endorsed on the said writ, &c., or any part thereof.

At the trial a verdict was taken for the plaintiff for £1381 17s. 0d., by consent, with leave reserved to the

(a) 3 Ell. & B. 781.
(c) 4 East 523.
(e) 6 Q. B. 370.

(b) 6 C. B. 608.
(d) 3 Q. B. O. S. 187.
(f) 3 U. C. Q. B. 280.

1860.

Carroll
v.
Potter.

defendant to move to enter a verdict for him, on the first, second, and third pleas, if the court should think that certain attachments which were given in evidence upon the trial were entitled, under the facts proved, to prevail against the plaintiff's execution.

A rule *nisi* was granted accordingly in Michaelmas Term, (1859,) which was argued in the same term, and the court gave judgment discharging the rule and upholding the verdict for the plaintiff.

The defendant has appealed from this judgment.

The facts of the case and the grounds of the judgment are fully stated in the printed case.

Judgment. On the 10th of April, 1857, *Pickle* then living in the county of Oxford, gave a confession of judgment for £3000 to the plaintiff *Potter*, a lumber merchant living in Brantford, in a *suit in which no process* had been served or sued out, with stay of execution till the 1st of April, 1858. The judgment was entered on the 18th of April, 1859, on that confession.

Early in August, 1858, before the 6th August, *Pickle* absconded from Canada, and afterwards on the 15th of August, 1858, the plaintiff issued a writ of *fiery facias* on his judgment endorsed to levy £2750 damages and £8 14s. 9d. costs, which writ was placed in the sheriff's hands on the following day.

At the time that *Pickle* absconded there were four writs of *fiery facias* in the sheriff's hands against his goods, and on the 6th August the sheriff seized under these writs all his goods, consisting chiefly of a quantity of lumber. On the 7th August, 1858, the first attachment against *Pickle* under the absconding debtors' act was put into the sheriff's hands. It was at the suit of the Commercial Bank for a debt of £125, and was issued from the Common Pleas.

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On the 10th August, 1858, another attachment against *Pickle* came to the sheriff from the Queen's Bench, at the suit of one *Moore* for £888 14s. 4d., and on the 16th August, and between that day and the 6th February, 1859, nineteen other attachments against *Pickle* at the suit of different creditors were delivered to the sheriff for sums amounting in all to £5986 4s. 8d.

1860.

Carroll
v.
Potter.

In October, 1858, the goods of *Pickle* which the sheriff had seized under the four writs of *fi. fa.* held by him on the 6th of August, were sold at public sale by the sheriff and brought £2446 18s. 2d.

After deducting certain expenses of insurance, &c., and paying the sums to be levied under the four writs of *feri facias*, amounting in all to £699, there remained in the sheriff's hands a large balance, which the plaintiff, *Potter*, claims was applicable towards the satisfaction of his writ of execution, which was placed in the sheriff's hands on the 15th of August, 1858.

Judgment.

The sheriff, however, applied the money towards the discharge of the executions which had, in the meantime, been placed in his hands by the attaching creditors, whose attachments had been sued out the first, on the 7th of August, 1853, and the others within six months afterwards; and on the 29th of July, 1859, he returned *nulla bona* upon *Potter's* execution acting under the conviction that the attaching creditors were entitled to priority over *Potter*, who had not commenced his suit by process served before the debtor absconded.

The question is, whether that application of the money was legal, or whether *Potter's fi. fa.* was not entitled to priority over the executions of the attaching creditors?

The Court of Common Pleas were of opinion that *Potter* was entitled to priority, and have, therefore, sustained this verdict in the action against the sheriff for damages, and a false return to his writ of execution.

1860.

Against this judgment the sheriff has appealed.

Carroll
v.
Potter.

This, then, is an action brought to try the right to the money which remained over in the sheriff's hands, after he had satisfied the four writs of *fi. fa.* which had come to him before the 6th of August, 1858, and were then lying in his hands current and unsatisfied.

No one disputes that those four executions being prior to any writ of attachment being sued out, were properly paid in full out of the proceeds of the sheriff's sale. The question is, what application the sheriff should have made of the surplus, after satisfying those writs and certain charges which are mentioned in the evidence. If he was wrong in assuming that the surplus was to be divided rateably among the attaching creditors, who had obtained executions, then the judgment given in the court below is right.

Judgment.

The plaintiff, *Potter*, can say truly that he had obtained judgment against the debtor, *Pickle*, before he absconded; though he must admit that his judgment was not in a suit which he had commenced by service of process, as the 55th clause of the statute provides it must be, in order to entitle it to priority, and he can also say truly that he sued out a writ of *fi. fa.* against *Pickle's* goods upon that judgment, on 15th August, 1858, and put it into the hands of the sheriff on the following day, whether before or after a second attachment at the suit of the Commercial Bank, against *Pickle*, for £239 2s. 9d. was delivered to the sheriff, does not appear, and is not material.

On behalf of the attaching creditors, in whose favour the sheriff decided, it is to be said, on the other hand, that on the 7th August, 1858, an attachment against *Pickle* for £125, as an absconding debtor, was delivered to the sheriff; that on 10th August, 1858, another attachment was delivered to the sheriff at the suit of

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Moore, for £888 14s. 4d., and that afterwards, and within six months from the date of the first writ of attachment, there were other writs of attachment against *Pickle* for an amount in all very much exceeding the surplus which is now in question, and the defendant contends that all these attachments, according to the Common Law Procedure Act of 1856, which was at that time in force, were entitled to stand upon an equal footing of right, and to be paid rateably in proportion among themselves, to the amount of the judgments that should be obtained in the several attachment suits. There can be no doubt on that point; it is clear all those attachments which came to the sheriff within six months from the delivery of the first, as I believe they all did, stand on the same footing. They were either none of them entitled to take precedence of *Potter's fi. fa.*, or all of them were. It seems to me to be clear that they were all entitled to be preferred to *Potter's* execution, under the express provision of the statute, by reason of *Potter's* suit not having been commenced by process served before the suing out of the first writ of attachment against *Pickle*; that circumstance excludes him from the benefit of the 55th section of the Common Law Procedure Act of 1856, which would, however, have given him priority, his execution being prior in date to any obtained by an attaching creditor, and the fact of *Potter's* suit not having been commenced by process, it leaves the 57th section of the statute to its operation, the effect of which is, that the money made from the sale of the goods is to be distributed rateably among all the attaching creditors.

1860.

Carroll
v.
Potter.

Judgment.

I do not think we can avoid holding this to be so, unless we discard, which we have no authority to do, that part of the 55th clause which makes the commencement of the non-attaching creditor's suit by *service of process*, one of the two conditions of his obtaining priority over such attachments as may have been sued out before he obtained judgment.

1860.

Carroll
v.
Potter.

The legislature may or may not have duly considered all the consequences of this provision being made in the terms in which it stands; but I do not think we can have any doubt as to the meaning of the language they have used, or that we can decline to give effect to the statute according to its obvious construction.

It may be that the legislature apprehended that a debtor on the eve of absconding would be apt to confess a debt which was really imaginary in favour of some friend for the purpose of covering his effects for his own benefit, and that it might not be easy to obtain proof of the fraud, and that they therefore thought it prudent to give priority to the non-attaching creditor who was first to obtain an execution against the debtor, only in those cases where he has proceeded in the ordinary course by taking out and serving process which might appear to be some security against collusion. It must, however, be owned that the security would be rather apparent than real, since there would be little difficulty in making the fraudulent arrangement in time to serve process before the debtor absconded.

Judgment.

In *Daniel v. Fitzgerald* (a) we felt ourselves constrained to take the same view that I have now stated of the effect of the 55th clause, and I am not aware that there has been any decision to the contrary, and if there were indeed, it would be a decision against the plain words of the 55th clause. We may entertain doubts whether that provision does or does not make that disposition of the goods of the debtor which is most consistent with the just claims of the several parties, but we surely must treat it as an enactment that must prevail so long as it is unrepealed and unaltered.

The judgment given below in favour of the plaintiff, *Potter*, proceeds, as I understand, on the principle that

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when *Pickle's* goods were seized under the *fi. fas.*, or one of them, that were in the sheriff's hands on the 6th of August, such goods were thereby placed in *custodia legis*; that the attachment which came the next day (7th of August) could not, therefore, attach upon the same goods, and that the sheriff, moreover, took no step to lay on the attachment, as the phrase is, even if that had been possible; that the goods, consequently, were not bound by or for the purpose of these attachments, when *Potter's fi. fa.* was delivered to the sheriff on the 16th. of August, and that the attachments, therefore, could form no obstacle to the plaintiff, *Potter*, obtaining satisfaction out of the residue of the goods which were all still unsold, and in the sheriff's hands.

1860.

Carroll
v.
Potter.

I must say that I cannot take this view of the statute. From an early period it has been held, that where a second execution against the person of a debtor comes to the hands of a sheriff, who already has the debtor in custody at the suit of another plaintiff, the debtor is to be looked upon as being in the sheriff's custody upon the first, and this without the sheriff going through any form of arresting on the second writ, and without any thing being done to place the party in custody under such second writ. *Frost's* case (a) was a case of that kind, in which the court resolved "that when a man is in the custody of the sheriff by *process of law*, and afterwards another writ is delivered to him, to arrest the body of him who is in custody, presently he is in the custody by force of the second writ, by judgment of law, although he do not actually arrest him; for to what purpose should he arrest him who is and was before in his custody? *Et lex non præcipit inutilia, quia inutilis labor stultus*, and the writs of the *capias ad satisfaciendum* are not only *quod capiat, &c.*, but *quod salvo custodiat, &c.*, so that although he cannot take him whom he has in his custody, yet

Judgment.

(a) 5 Coke, 89.

1860. he may safely keep him," *Britton v. Cole*, (a) and *Jackson v. Humphreys*, (b) are to the same effect, and the same principle has been frequently affirmed. (c) The sheriff, consequently, would be liable for an escape at the suit of the plaintiff in the second *ca. sa.*, if he were to let the debtor go after the first writ being satisfied, that is, provided the imprisonment of the debtor under the first writ was legal, but not otherwise, as was determined in the late case of *Hooper v. Lane*. Such is the law as regards executions against the person, and it is quite plain that the analogy holds in the case of goods being seized by a sheriff under a writ of *fi. fa.*, when another writ of *fi. fa.* afterwards issues against the goods of the same defendant, to the same sheriff, at the suit of another plaintiff. It is clearly held that in such cases without any seizure made under the second writ, of goods that had been already seized, and even were in custody of the same officer under the first writ, the goods must be held to satisfy the second writ, if any thing should remain after satisfaction of the first. This was assumed to be the law in *Beekman v. Jarvis*; (d) and in *Drew v. Lanison*, (e) and *Jones v. Atherton*, (f) the matter is treated as being perfectly plain. In the latter case. *Gibbs*, C. J., says, "If the sheriff has the writ in his office, though no warrant be made on it, if he afterwards gets possession of the goods, though apparently under another writ, yet his possession shall inure to the case of the first writ."

Judgment.

In the other case, of *Drew v. Lanison*, Lord Denman said, "The duty of the sheriff, when he has several writs of execution, is clear. He is to execute them according to their priority, which, as to writs of *feri facias*, is according to the time of their delivery to him. By *executing* is meant that he is to apply the proceeds

(a) Com. 484.

(c) Buller N. P. 66; 1 Bos. & P. 24.

(d) 8 U. C. R. 280.

(f) 7 Taunt. 56.

(b) 1 Salk. 273.

(e) 11 A. & E. 529.

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of goods seized in that manner. It is not material whether he seizes the goods under the first or under the last writ, as soon as they are seized they are, in point of law, in his custody, under all the writs he then has, and when he sells them, he sells, in point of law, under all the writs."

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Potter.

In such cases the question in fact is about the disposal of the money produced by the sale, and the point is conveniently brought up in an action against the sheriff for a false return.

I do not apprehend that any difficulty is allowed in such cases, or should be allowed in this, to be created by applying the principle that goods cannot be seized under legal process which are already in the custody of the law. That principle in reason, I think, cannot be applied where the goods and the proceeds are all under the control of the same officer whose duty it must be to dispose of them as the law requires, but only in cases where goods being already seized under legal process are in the hands of one officer, and are attempted to be afterwards seized and taken out of his hands by another officer upon some other process, which latter seizure, if persevered in, would defeat the first; as a general rule the law prohibits that, though there are several exceptions, as the court considered there must be in the case of *Francis v. Brown*. (a)

Judgment.

I think there is nothing in this case which relieved the sheriff from the responsibility of determining how the remaining proceeds of the goods sold ought to be applied, and that it was his duty to apply them according to the legal rights of the parties under the absconding debtors' acts, which it seems to me must govern. If the *fi. fas.* which were delivered to him on the 6th of August or before, had been all for some reason invalid, and had

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been set aside after the 7th of August, or if, which would be a clearer case, the debtor who had absconded had sent from the foreign country to which he fled sufficient money by a friend to satisfy all the executions in full, and had sent him at the same time authority to demand his goods from the sheriff in his name after the executions had been discharged, ought the sheriff to have given up the goods in either case notwithstanding these attachments had come to him before such demand was made? I think most clearly not. No doubt it would have been his duty, though he had never actually seized under them at all, especially the goods which were already in his hands under the *fi. fa.*, still to detain the goods in his hands for the benefit of the first attaching creditor, and of all the other creditors who might place their attachments in his hands within six months.

Judgment.

As was said by the court in *Foster's* case, with reference to executions against the person, the command to the sheriff is not merely to take, but to keep and detain, so in regard to these writs of attachment under the absconding debtors' acts, the command of the writ in the form given by the legislature (C. L. P. Act, 1856, schedule A., No. 7) is that the sheriff shall attach, seize, and *safely keep* all the real and personal property of the debtor who has absconded to secure and satisfy the plaintiff a certain debt or demand, and to satisfy the debt and demand of such other creditors as shall duly place their writs of attachment in the said sheriff's hands, or otherwise lawfully notify him of their claim and duly prosecute the same. The writ also contains a notice addressed to the debtor that in case of his failing to put in bail, the plaintiff may proceed to judgment and execution, and may sell the property so attached. I cannot read this writ and the various clauses of the Absconding Debtor's Act as it now stands in the Consolidated Statutes of Upper Canada, chapter 25, embodying the clauses of the Common Law Procedure Act of 1856, which were in force when these

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proceedings were going on, without seeing that the legislature did not give the process by attachment for the mere purpose of compelling the appearance of the absconding debtor. They provided by it also for the detention and safe custody of the goods, in order that they might be forthcoming for the satisfaction of the debts of all the attaching creditors who should obtain judgment, having taken out their attachments within six months after the first of such writs.

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It is quite true that if the attachment which came to the sheriff on the 7th August was the only one that we knew of in this case, and if the debtor had put in bail to that writ, and if the four *fi. fas.* had been satisfied before Potter's *fi. fa.* came to the sheriff, he would have got his goods back, and then the effect of the first attachment would have been only to compel appearance. But here there were many writs of attachment that came within six months, as I think all the 21 did, and it is clear under the statute they must be looked upon like so many sums added to the first attachment. The 54 section (C. L. P. Act of 1856) expressly dispenses with the necessity of any appraisement or inventory in connexion with the subsequent writs, and if the sheriff having these goods in his custody under the writs of *fi. fa.* long before he sold them did omit to have any appraisement of them made or any distinct inventory under the first attachment, then whatever remedy the owner of the goods, or the attaching creditors might have against him for any damage arising from that omission, I do not think we could hold that the attaching creditors lost the benefit of their attachments in consequence of it.

Judgment.

It appears to me that the sheriff having seized these goods under the first four writs of *fi. fa.* before any other process against the goods had reached him, was bound to satisfy those writs first, as he did out of the proceeds of the sale. And that whatever money remained

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in his hands after deducting his legal charges was applicable to the executions of the attaching creditors, whenever they might get the length of execution, in the same manner as if they had all put their attachments into his hands at the same time, viz., on 7th August. It was the duty of the sheriff to keep the money, as he would have kept the goods, if they had not been sold till the period arrived for a rateable distribution. And as the attaching creditors were, I think, entitled to the whole of the remaining proceeds, provided so much was required for paying them up in full, as it clearly was, it must follow that the plaintiff *Potter* coming with his *f. fa.* on the 16th August cannot claim to be satisfied to any extent.

Judgment That appears to me to be the conclusion to which we must come, under the 55th section of the C. L. P. Act of 1856, for the reason that *Potter* had not commenced his suit by process served, and so had not a claim to the priority which he would otherwise have had by reason of his having obtained execution before any attaching creditor.

If he had had either of the claims to precedence which the 55th clause makes necessary, he would have come before all the attaching creditors; but wanting all of these requisites he must go behind them all, I think, and the money ought to have been distributed (as it seems it was) rateably among all the attaching creditors, according to the 57th section, not affected under the circumstances by the 55th section, for it is perfectly clear that *Potter's* case does not come within that section. If this is not what was meant by the legislature, or is thought to be unjust or inexpedient, still it appears to me to be a consequence so plainly flowing from the law as it stands that we cannot hold otherwise very well till the act is altered by the legislature. The provision made by the 55th section has stood ever since the statute 5 Wm. IV., ch. 5, was passed, of which it formed

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the 4th clause, and I cannot say that I have any doubt on a careful perusal of it that the legislature only meant to postpone the attaching creditors in favour of any person who not previously by attachment has obtained execution before them, or any of them, provided such other person had taken out his writ and served it before the debtor absconded, thereby giving proof that he used greater diligence than the others, and that he was in the ordinary course of proceeding by compulsion to enforce his demand *in invitum*, and not by collusion with the debtor, in which case it would seem hard that he should not have priority merely because the debtor after he had been served by him had absconded.

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In the argument, the following cases decided upon this branch of the law were cited and reasoned upon, but I do not find that they are any of them inconsistent with the opinion which I have expressed. *Gamble v. Jarvis*, (a) *Bank of British North America v. Jarvis*, (b) *Beekman v. Jarvis*, (c) *Francis v. Brown*, (d) *Cann v. Thomas*, (e) *Daniel v. Fitzell*. (f)

Judgment.

In my opinion, the judgment given below should be reversed, and the rule for entering a verdict in favour of the defendant should be made absolute.

Mr. Justice *McLean*, who heard the case argued, and is now unavoidably absent, has authorised me to say that he has come to the conclusion that the rule for entering a verdict for the defendant should have been made absolute.

DEAPER, C. J.—I do not perceive any ground upon which it can be successfully contended that the property, credits, and effects of an absconding debtor are bound either by the issuing of a writ of attachment, or by the delivery of such writ to the sheriff. The sheriff

(a) 5 U. C. O. S. 272.

(c) 8 Ib. 280.

(e) 17 Ib. 9.

(b) 1 U. C. Rep. 182.

(d) 11 Ib. 558.

(f) 17 Ib. 869.

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must, in my opinion, "take into his charge or keeping, all such property and effects," in order to subject them to the operation of the writ. The duty imposed upon him, of making an inventory or appraisal of the goods attached, and returning such inventory or appraisal, together with the writ, confirms me in this impression.

Judgment. When the property and effects are thus taken, the sheriff's duty, unless they are of a perishable nature, is to keep them until one of three things happens, viz.: 1. That the defendant in the writ of attachment puts in and perfects special bail, in which case such property and effects (or if they have been sold as perishable, then the net proceeds thereof) are to be restored and paid to him, unless the sheriff has some other lawful ground for withholding them; or 2, that the plaintiff obtains judgment and issues execution, when the sheriff's duty, with regard to selling, will be the same as in other cases, the distribution of the proceeds being rateable in cases coming within the 29th section of the Absconding Debtors' Act; (a) or, 3rd, if the plaintiff fails in his suit, then the sheriff must restore the goods, unless he has some lawful ground to retain them. The effect of the attachment, therefore, is either to enforce the defendant to put in special bail, or to hold his property to satisfy any judgment which the attaching creditor or creditors may recover.

In the present case, the goods were seized on execution before any writ of attachment came to the sheriff's hands. Even if an attachment would bind goods before it was executed, in the present case there were no goods to be bound by it, for they were in *custodia legis*, taken in execution. So far, at least, the writ of attachment was inoperative. I do not understand it to be contended that the seizure on a writ of execution could enure as a seizure on a writ of attachment subsequently received by the sheriff, since the objects of the two writs are wholly

(a) Consol. Stat. U. C., ch. 25.

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different, as I shall have occasion to observe hereafter. 1860.
 What *Patterson, J.*, says in *Wintle v. Freeman*, (a) Carroll
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Potter.
 applies only to writs of execution.

The four executions which were in the sheriff's hands before any writ of attachment was delivered to him, only directed the levy of £824, with incidental costs and expenses. Under the executions, all the debtor's goods were seized. Then the sheriff received the two writs of attachment, and next the respondent's execution for £2765. The sheriff sold goods to the amount of £2246 18s. 2d. It is not asserted that the attaching creditors had obtained judgment when the sale took place. Nor was it urged that from the nature of the property seized, which was lumber, (selling the whole of it could not be avoided,) that the sheriff could not have sold enough to satisfy the executions received by him before the first attachment, and then have stopped, holding the residue subject, if by law they were subject, to the attachments. As little was it urged that the goods were sold under the 15th section of the Absconding Debtors' Act, as perishable. Judgment.

The sheriff, therefore, had no authority to sell, except that derived from the executions in his hands, (b) and after satisfying the first four, he had no authority to continue to sell, unless it was under the respondent's writ. But goods which produced at least £1400 were sold after the first four executions were satisfied. And the sheriff appears to me to be in this dilemma, either he sold under the respondent's writ, or he sold without authority. And he is now setting up the claim of the attaching creditors, which is a claim to have the goods themselves held for their benefit, as an answer to the respondent's claim to the money which they produced at the sale.

In *Rybot v. Peckham*, (c) it was held that the sheriff,

(a) 11 A. & E. 548.

(b) Vide per Lord Denman, in *Drew v. Lainson*, 11 A. & E. 527.

(c) 1 T. R. 731.

1900. having once sold under the plaintiff's execution, was answerable to him for the debt, though the sheriff, after the sale, discovered a prior execution in his office, and consequently returned the plaintiff's writ *nulla bona*. In that case the sheriff was probably liable to the party who delivered the first execution to him for neglect, and here, if the sheriff is liable (which I by no means affirm) to the attaching creditors, it would not relieve him from accounting for the money to the respondent, on whose execution the goods must, on the facts appearing, be taken to have been sold. And *Rybot v. Peckham* is approved of in *Hutchinson v. Johnston*, (a) where the court take the distinction between a seizure under a second execution, followed by a sale under a prior one, and a seizure and sale, both under the second writ. As explained by Gibbs, C. J., in *Jones v. Atherton*, (b) if the sheriff has the first writ in his office, and he afterwards gets possession of the goods, though apparently under another writ, such possession shall enure to the use of the first writ. If, therefore, the sale in this case must necessarily be treated as made under the respondent's writ, after the prior executions were satisfied, the plaintiff would seem entitled to recover. The goods were not sold under the writ of attachment, and as there were goods remaining after the satisfaction of the first four executions, the 2nd and 3rd pleas are (at least literally) disproved.

Judgment.

But, independently of this, the seizure in execution is a complete and exhaustive act, leaving nothing in the execution debtor capable of being seized, though the right of property so far continued in him, that at any moment before execution executed he may entitle himself to a restoration, by paying off the demands in the sheriff's hands. But the sheriff cannot, in fact, make a new seizure, *toties quoties* he receives a new execution. And accordingly, Holt, C. J., in *Bachurst v. Olinkard*, (c) held, that goods once seized and in custody of the

(a) 1 T. R. 729.

(b) 7 Taunt. 58.

(c) 1 Show. 173.

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Carroll
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In the present case, when the attachments came into the sheriff's hands he could not seize the goods in question for the purpose of those writs, because he had them already in execution, any more than a landlord could have distrained upon them. Neither could these seizures in execution operate as a seizure to bind the goods for the purposes of the attachments, for the one was a final, the other was a mesne process; the result of the former was certain, namely, the satisfying the debt recovered by sale of the goods, while the result of the latter was contingent on the plaintiff's recovering judgment, and *per se* the latter did not authorise the turning the goods into money. I do not perceive any principle on which to hold that a writ of attachment binds the goods before seizure; if not, I fail to perceive how it can operate upon goods which cannot be seized under it, or how it can intercept and defeat the operation of a writ which is capable of binding goods from the moment the sheriff receives it, and when, as we understand the law, such writ coming into a sheriff's hands who has already seized goods of the execution debtor under a prior writ, the seizure under the first writ operates as a seizure upon every subsequent execution from the moment of its delivery to the sheriff. The second execution is thus capable of an immediate operation, while the attachment cannot be laid on until the executions prior to it are satisfied. Judgment.

It is, perhaps, idle to speculate on what the legislature would have done had this precise case been presented for their consideration. Strong arguments might be advanced to shew that in reason and justice a creditor who had entered up his judgment many months before his debtor absconded, where no fraud was imputed to the creditor, should not be deprived of his remedy by execution, by a writ of attachment being placed in the hands of the sheriff a few days or a few hours before he

1860. issued his *fi. fa.* In the absence of any such statutory rule, I think the respondent, upon technical grounds, at least, has a priority, and, therefore, that the appeal should be dismissed.

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Potter.

Judgment.

BURNS, J.—According to the cases of *Gamble v. Jarvis*, and *Bank of British North America v. Jarvis*, goods which have been seized and taken into custody of the sheriff upon an attachment are so far *in custodia legis* that an execution, before one obtained upon the attachment demand, unless it be obtained under the provision for allowing priority in cases where the plaintiffs have commenced a suit and the process served before the writ of attachment sued out, cannot attach upon the goods. The effect of these decisions and the acts relating to absconding debtors is that when there happens to be a class of creditors of the absconding debtor who issue attachments, and another class of creditors who already have judgments but have not issued execution, if the attachments be laid on before a levy made upon an execution, then the attaching creditors are first entitled to be satisfied, provided they proceed on to judgment and execution, and the execution creditors must wait to be satisfied from any surplus, if there be any. A judgment creditor who has not issued an execution until after an attachment has been laid on will stand postponed till after the judgment and execution on the attachment be obtained and satisfied. Should there be several attachments issuing at different times, and some of them come to the hands of the sheriff after execution and some before the execution, I apprehend the inevitable result of holding that the goods once taken upon an attachment are *in custodia legis* is that all the attachment creditors are let into the exclusion of the execution creditor.

In the present case the judgment of the court below affirms that principle, and decides the case upon it with just this difference, that it is applied to executions where the goods happen to be *in custodia legis* before any

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attachment has issued, and the simple question is, whether the principle has been rightly applied or not. 1860.

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As we see, the courts have held upon the construction of the absconding debtors' acts, that attaching creditors do acquire a right of lien, unless in certain cases provided for; so on the other hand, as observed in the judgment of the court below, we do not find that the legislature has provided for a case of this kind, but it has been left for the courts to say how the rights of the parties shall be dealt with. If we put out of question the attachments intervening between the first execution and *Potter's* execution, there could be no question that the seizure upon the first execution would enure to the benefit of *Potter*, and the sheriff in that case would make no further seizure or do any thing more than he had done upon the first execution. Then, when an attachment comes into his hands after the first execution and before *Potter's*, the question is, what is the effect of it? The act of parliament declares that the sheriff shall forthwith take into his charge and keeping all the property, credits and effects, &c., of the absconding debtor. How can he take them into his custody upon the attachment when he already has them upon an execution? Suppose the goods were in the hands of the coroner upon a writ of execution, the sheriff upon an attachment could not seize them, nor could the goods be seized by a coroner upon an attachment while the sheriff had them upon execution. The whole argument in favour of the attaching creditors in this case must rest on the fact of all the different writs coming to the hands of the one and the same officer, and upon the assumption that the property seized upon the execution was liable to the writ of attachment the moment that came to the sheriff's hands without any other act done. No doubt the sheriff might, when he received the attachment, have gone to where the goods were and laid his hands upon them, and said he took them again upon the attachment, but to say that he should have done so, or

Judgment.

1860. that he could then take them legally into his custody, is to ignore the principle that the goods at that very time were in custody of the sheriff upon a totally different species of process, and for another purpose. What the sheriff is bound to do, and how his acts are to be interpreted, I consider depends upon the nature of the different kinds of process in his hands. For instance, when he makes a return of *nulla bona* to a writ against goods, he may shew, although there were goods, that they were applicable to some other demand, and not to the writ which he has so returned. So here, the goods being seized upon the executions, were not any more applicable to the writs of attachment in the sheriff's hands than if those writs had been in some other person's hands. A very important distinction between writs of *fi. fa.* and writs of attachment is to be borne in mind. Writs of *fi. fa.* bind the goods from delivery to the sheriff, except when sale made in market overt, and goods in cases of writs of attachment are not bound until the attachment be laid on as it is called. In this case when the attachment came into the sheriff's hands it could not be laid on in consequence of the goods being in custody upon a writ of *fi. fa.*, and that was not relieved until another writ of like character and quality came in.

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Potter.

Judgment.

I put out of question the circumstance of the sheriff having the custody of the goods, or the possession of the writs, and treat the matter in this way: the goods were in the custody of the law upon an execution; while in that custody they could not also be at the same time in custody upon a totally different kind of writ, and for another purpose. The custody upon the writ of execution had not ceased when another execution came in. If it could be established that the custody on the writ of execution had ceased, or if it can be established that one custody will operate for, and enure to the advantage of two different descriptions of process, and that the lodging of the writ of attachment has the same operation and effect as that of lodging a writ of execution,

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then there would be room for the position assumed by the attaching creditors. But the custody upon the writs of execution continuing until, and at, and after the time of *Potter's* execution coming in, I think it must be satisfied before the attachments can be said to operate and change the custody of the property.

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Potter.

The effect of holding that the coming in of the attachment changed the legal custody, or that it created a joint custody with the previous writs of execution, would be to deprive *Potter* of all benefit of his *fi. fa.*, for in such case the writs of attachment subsequent to his *fi. fa.* would also take precedence of him. Holding, as the court below has held, that the custody of the goods upon execution before any attachment issued enured for the benefit of subsequent executions so long as they came when the goods were still in that custody, just places creditors having judgments and executions upon an equality with attaching creditors: that is, whichever class of creditors can first step in and obtain possession of the goods, the possession will enure to the benefit of all belonging to that class first of all.

Judgment.

The legislature, by preserving the priority to the creditor who may have commenced his suit and served process before an attachment issued, shews that the absconding debtor's creditors were not all to be placed upon an equal footing. In any other case an attachment laid on would take precedence of an execution coming afterwards, but I do not think the legislature ever meant to exclude a creditor who has a judgment from taking out an execution on that judgment when he sees the goods are already in custody upon previous executions, though an attachment may precede his execution. If he could not take his execution, then he must resort to his attachment with the others; but it appears to me, that so long as the goods are in the custody of the law upon execution, and that custody not changed to one under the writ of attachment, as I think was not the case here,

1860. then I think the creditor was at liberty to issue his execution and obtain satisfaction in that way, and was not compelled to resort to his attachment.

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For these reasons I think the judgment is right.

Judgment. SPRAGGE, V. C.—The sheriff had in his hands, first, several writs of execution; next in order, two writs of attachment, next, the execution in question, and then a number of writs of attachment. The priority of the *fi. fas.* in the hands of the sheriff before the first two attachments is not questioned; the question is, between the attachments and the execution of *Potter*, the plaintiff at law. In the court below the attachments are postponed, not because the execution is entitled to the protection of section 21, but because the attachments did not operate upon the goods before the plaintiff's execution was in the sheriff's hands. In *Kingsmill v. Warrener*, upon appeal, it was held that the goods did not become in *custodia legis* by the mere placing of attachments in the hands of the sheriff—some act of the sheriff was held to be necessary—but *what* act was not determined, nor was it necessary. I have referred to the several cases cited by Sir James Macaulay, in relation to what he considered to be analagous proceedings; I do not find that they shew what course it is the duty of the sheriff to take upon an attachment, but I take it to have been settled in *Kingsmill v. Warrener*, that *some act* must have been done by the sheriff to place the goods in his custody as sheriff, so that if the first process in this case in the sheriff's hands had been the attachments, and nothing done upon them, and then this execution had been placed in the sheriff's hands, the execution must have prevailed.

The question is, whether the fact of writs of *fi. facias* being current in the sheriff's hands at the time of his receiving the attachments, and his having actually seized the goods under the writs of *fi. fa.*, makes any difference? By the delivery of these writs to the sheriff

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it is well settled that the goods were in *custodia legis*; and I think it is also well settled that they were in his hands to answer any subsequent writ of *fi. fa.* that might be placed there, and that the plaintiff's *fi. fa.* attached upon them when placed in the sheriff's hands—by the mere act of the writ being placed there—they were in the custody of the law to answer that execution, subject, certainly, to the prior executions—whether subject to these attachments may be questioned, and upon that the question is, whether it was necessary for the sheriff by some overt act to “take” the goods, in the words of the act, “into his charge or keeping.” They were already in his charge for some purposes. The nature of the property in the goods after delivering the *fi. fa.* to the sheriff was much discussed in *Giles v. Grover*, (a) and again, in *Woodland v. Fuller*. (b) In the former case, where the question was between the priority of an extent in aid, and a writ of *fi. fa.*, Mr. Justice Patten observed: “The Crown has a right to say that the sheriff whilst the goods are in his hands holds them, for the benefit of any one who may have a legal charge against them, as the property of the debtor.” The language of Mr. Baron Vaughan upon the same point is: “That the sheriff is invested with power as the ministerial officer of the law to protect the property, whilst remaining in his custody, for the benefit of those who may be entitled to it, cannot be disputed.” Chief Justice Tindal said: “It would be a better definition of the sheriff's relation to these goods to say, he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are in *custodia legis*, a phrase which plainly distinguishes a mere custody and guardianship of the goods from a charge on the property.”

1860.

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v.
Potter.

Judgment.

In *Giles v. Grover* there had been a seizure by the

(a) 9 Bing.

(b) 11 A. & E. 859.

1880. sheriff. In *Woodland v. Fuller*, only a delivery of the writ to the sheriff; and I apprehend that an actual seizure by the sheriff does not at all change the position of the sheriff in relation to the goods. I think he holds them from the first "for the benefit of any one who may have a legal charge against them as the property of the debtor." I am unable, therefore, to assent to the position of his Lordship the Chief Justice of the Common Pleas, that the sheriff could not attach the goods at any time before the sale; nor can I agree in the reasons given, "because at the time of the receipt (of the writs of attachment) and until the sale these goods were bound by the executions previously in his hands, and they continued so bound until the plaintiff's *fi. fa.* was delivered to him;" and "while the first execution remained in force they prevented the application of the attachments on the goods, and consequently suspended their operation."

Judgment. This seems to assume that the sheriff having seized goods under a *fi. fa.*, held them subject only to other writs of the like nature; not generally to answer any legal charge against them, and would disable the sheriff from making an actual seizure of goods under writs of attachment, because he already held them under *fi. fa.* Now, what the learned judges were speaking of in *Giles v. Grover* was not of another writ of the same, but of a different nature, and I have not myself seen any case in which it has been held that goods in the custody of the sheriff are held by him only to answer process of the same nature, and I confess that I should not myself have doubted, but for this passage in his Lordship's judgment, that it was in the power of the sheriff, upon these writs of attachment coming into his hands, to make an actual seizure of the goods under the attachment, and that it was his duty to do so, if doing so was necessary to subject the goods to the attachments.

Now, as to the necessity for such actual seizure: in this case the sheriff had actually seized these goods under

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the writs of *fi. fa.* : would it be necessary for him to seize them again when the attachments came into his hands ? The attachment commands him to "attach, seize and safely keep." He already holds them to answer any legal charge upon them ; they are consequently subject to that charge as soon as it is placed in the sheriff's hands, and, if so, it must attach by the fact of its reaching the sheriff's hands, and cannot, as it appears to me, need the ceremony of a re-seizure.

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v.
Potter.

Here, as it appears, an actual seizure of goods had been made by the sheriff under the writs of *fi. fa.* ; but if this had not been the case, still by the delivery of the *fi. fa.* they were in the eye of the law in the custody of the sheriff, and were held by him subject to answer any legal charge. It is true that if the process had been an attachment instead of a *fi. fa.* some act of the sheriff would have been necessary in order to the goods becoming in his custody, which, the process being a *fi. fa.*, has not been necessary, but the goods are in his custody, and for that purpose, without that act. Assuming that the attachment must be "laid on," can it not be laid on by operation of law ? A second attachment after seizure upon a first does not, I apprehend, require a second seizure in order to its binding the goods, the reason being that they are already in the custody of the sheriff.

Judgment.

I have come to the conclusion, although I confess not without some doubt, that upon the writs of attachment being placed in the sheriff's hands, they attached upon the goods already in the custody of the sheriff under the writs of *fi. fa.*, they being in his custody to answer not only the exigency of those particular writs, but any legal charge against them ; a writ of attachment being such legal charge.

It seems to be conceded that in order to a creditor bringing himself under the protection of the 21st section

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v.
Potter.

Judgment.

of the act he must have commenced his suit by process sued out and served upon the debtor. In this case judgment had been entered up more than a year before the debtor absconded, and the creditor was in a position to issue execution before he left. To bring himself within the 21st section, it would have been necessary for him to begin again by issuing and serving process. This he might have done more than a year after he had recovered judgment. It seems a very anomalous position. If he had issued and served process, and then taken a confession of judgment, he would have been protected. The taking out process really does little or nothing towards protecting *bona fide* creditors; and besides, all judgments, however recovered, are impeachable at their instance. The language of the old statute, 5 W. IV., ch. 5, was much more explicit than it is in the Common Law Procedure Act. It provided that "any person who shall have commenced a suit against another by process bailable or non-bailable, which process shall have been served before the suing out of any attachment," &c. The language in the Common Law Procedure Act is, "Any person who has commenced a suit in any court of record of Upper Canada, the process wherein was served or executed before the suing out of a writ of attachment," &c. The goods being in *custodia legis* under the attachment, some such provision has been supposed to be necessary, in order, at least, to displace *pro tanto*, or in *toto* the custody of the sheriff; under the attachment only a certain class of creditors, those who sued in a particular way, were admitted. This was clear under 5 W. IV.; but it hardly appears so clear to me under the later act. In both he must obtain execution before the attaching creditor; and by the later act he must have commenced his suit before attachment issued, and have proceeded so far as to serve process. It does not, as in the former act, describe the class as those who shall have commenced suit by process bailable or non-bailable: but rather makes this class, those who shall have commenced suit, the process being only referred to

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with reference to the stage to which the suit shall have reached, and if it has reached beyond that stage, though not by that course, there may be some reason in asking if the legislature could have intended to exclude them; and did not rather mean to provide that to entitle them to the benefit of the suit they have commenced, they shall have proceeded as far at least as the service of process. If they have proceeded further, though not by service of process, they should be admissible, it being the stage reached, not the course of reaching it, that was intended to be provided for.

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v.
Potter.

I believe, however, this is not the interpretation which has been put upon the act by the common law judges, who are certainly most competent to read it aright; and I should be slow to attach weight to the doubt that occurs to my mind in opposition to their opinion.

Taking it, then, that *Potter* was not a creditor within the exception of the 21st section, (upon which point I do not press my individual opinion,) I think, though as I have intimated, with some doubt and hesitation, that the attachments are entitled to prevail. Judgment.

Per curiam.—*Appeal dismissed with costs.*—[*Sir J. B. Robinson, C. J., McLean, J., and Spragge, V. C., dissenting.*]

1854.

[Before the Hon. John Beverley Robinson, C. J., the Hon. William Hume Blake, Chancellor, The Hon. James Buchanan Macaulay, C. J., C. P., The Hon. Mr. Justice McLean, The Hon. Mr. Justice Draper, The Hon. Vice-Chancellor Esten, The Hon. Mr. Justice Burns, and The Hon. Vice-Chancellor Spragge.]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

DIXON V. McLAUGHLIN.

Grant from the Crown—Metes and bounds—Trespass quare clausam fregit.

The Crown, by a patent in 1888, granted a parcel of land as containing 70 acres, being the easterly half of lot No. 30 in the 7th concession of the township of Albion; the metes and bounds being given as commencing at the south east angle of the rear or east half of the lot, (such point being known and undisputed, and the Crown at the time owning all the land in that concession beyond that lot,) then on a course north $45^{\circ}45'$ west 10 chains, *more or less*, to the allowance for road on the northern boundary of the township, (which was also well known and ascertained) then south 74° , west 35 chains 50 links, more or less, to the allowance for road between lots 30 and 31; then south $39^{\circ}30'$, west 1 chain 50 links, more or less, to the centre of the concession, &c.; and in the year 1850, another grant was made of lot No. 31, in the 7th concession, as containing 34 acres, without any description by metes and bounds. In the original survey of the township the allowance for road between lots 30 and 31 had never been run through, or any posts planted on the rear of the lots, although posts had been planted at the front angles, and by producing the line as it had been run between lots 30 and 31 in the 6th concession, the distance of 35 chains and 50 links, as given by the patent, along the allowance for road on the northerly side of the township, would be materially lessened. The owner of lot 31, treating the person in possession of lot 30 as a trespasser, in respect of all the land not included within such limits, brought an action of trespass against him. *Held*, reversing the judgment of the court below, that the grantee, under the patent of 1888, in the absence of any post to mark the allowance for road, was entitled to the full distance of 35 chains and 50 links, as specified in the grant, without any reference to the posts planted at the front angles of the lot. [Macaulay, C. J., Esten and Spragge, V. CC., dissenting.]

The action in the court below was brought by *McLaughlin* against *Dixon*. The writ had been issued on the 11th of November, 1852, and the declaration, which was filed on the 3rd of the following month, stated that the defendant, on the 11th of August, 1852, and on divers days and times, &c., *vi et armis*, broke and entered a close of the plaintiff in the township of Albion, called and known as lot No. 31, 7th concession Albion.

* See a p

The pleas were—1st, not guilty, and 2nd, not pos- 1854.
sessed—upon which the plaintiff joined issue.

Dixon
v.
McLaughlin

The cause was tried before his lordship Mr. Justice *McLean*, at the Toronto winter assizes, held in January, 1853, when it appeared that the township of Albion had been laid out, on the original survey, into concessions and lots with double fronts; the concessions being numbered from the south northwardly, and the lots numbered from the east westwardly, with a supposed width of 30 chains and depth of 66 chains and 67 links; that the northerly side of the township is bounded by a road called the Adjala or Tecumseth road, into which the concession roads of the township of Albion run, as also the side or division roads between the lots bounded by such roads, though in different directions, as shewn by the official plan of the township; * that the Adjala road cuts the lots bounded thereby not at right angles but diagonally, so that the highest numbered lots in Albion abutting thereon are broken lots, some being triangular lots and others with one corner cut off, so as to form angles on that side of the lot acute or obtuse, and not corresponding with the opposite angles of the lot which are right angles; that the highest numbered lot in the 6th concession is numbered 32, the highest in the 7th concession 31, and the highest in the 8th 30; that No. 31, in the 6th concession, and also No. 30, in the 7th concession, have each angles alike at three of the corners, with the north west corner cut off by the Adjala road; that No. 31, in the 7th concession, (the one in question,) is a triangular lot, according to the government plan, bounded on one side by the allowance for road between the 6th and 7th concessions, on another side by an allowance for road between it and lot No. 30, and on the third side by the Adjala road; that original posts were planted to mark the allowance for such side road between the lots Nos. 30 and 31, on that part of these lots which faces or is

Statement.

* See a plan of that part of the township at the end of this report.

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 v.
 McLaughlin.

Statement.

opposite the 6th concession; also at the limit between lots 29 and 30 on the same front, and at the south east or easterly angle of 30, in the 7th concession, on the front facing or opposite to the 8th concession; also that posts were planted at the points where the limits of the several concession roads intersected the Adjala road, but not at the points of intersection of the side or *division* roads, or of the limits between lots; and that the concession roads between lots 29, 30 and 31, in the 6th and 7th concessions, and between Nos. 29 and 30 in the 7th and 8th concessions, to their intersection with the Adjala road, are undisputed; that these concession roads therefore marked the south west fronts of 30 and 31 in the 7th concession, the imperfect parallel the north east front of No. 30, 7th concession, until it meets the Adjala road, and the Adjala road defines the diagonal fronts or sides of each of these lots (Nos. 30 and 31) on that road; that the distance from the allowance for road between the said lots Nos. 30 and 31, in the 7th concession, on the front which faces the 8th concession to the Adjala road exceeds the full depth of half a concession of 33 chains $33\frac{1}{2}$ links, and it was said that the distance from the same point to the entrance of the concession road, between the 6th and 7th concessions, into the Adjala road, exceeds the full width of a lot of 30 chains; that by running the side lines of those lots from those points or angles where posts had been planted, parallel to the course of the side line at lot No. 1, the centre of the 7th concession may be accurately ascertained, but that lines run from the two posts placed to mark the front angles of lot No. 30, at the lower or southerly side thereof, will not meet at the centre of the concession, and the line traced from the corner post or the south west angle of the lot No. 30, facing the 6th concession, will be nearer lot No. 1 of that concession, and more remote from the Adjala road than the line traced from the corner post of the opposite or south east angle of the said lot facing the 8th concession, the distance between the points where they severally intersect the centre of the concession, being between 6

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and 7 chains; that the line or limits of the side road between No. 80 and 81, 7th concession, was not traced from the westerly side of these lots through to the Adjala road in the original survey, and the object of the action was to determine whether the allowance for road between these lots, from the 6th concession front to the centre line of the 7th concession, should be continued through to the Adjala road, in other words, whether the allowance, as indicated in the original survey, is to be continued on the same line parallel to the line of lot No. 1, through the whole depth of these lots, until it intersects the Adjala road, or only to the centre line of the concession, and in that event, how the allowance for road between such centre line and the Adjala road is to be determined in consequence of what is called the jog caused by the corner posts at the lower or southerly angles of lot No. 80, not being opposite upon the course of the side lines of the concession.

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McLaughlin.

Statement

That on the 12th October, 1838, the east part of lot No. 80, 7th concession of Albion, (being apparently the residue of the lot exclusive of a full west half lot), was granted to the person under whom the appellant holds, and described in the government patent as containing 70 acres, commencing where a post has been planted at the easterly angle of the said lot, then north $45^{\circ} 45'$, west 10 chains, more or less, to the allowance for road on the northern boundary of the township, then south 74° west, 85 chains 50 links, more or less, to the allowance for road between lots 80 and 81, then south $89^{\circ} 30'$ west, 1 chain 50 links, more or less, to the centre of the concession, then south $45^{\circ} 45'$ east, 30 chains, more or less, to the southern limit of the said lot, then north $39^{\circ} 30'$, east 33 chains $33\frac{1}{2}$ links, more or less, to the place of beginning; that lot No. 31, 7th concession Albion, having been sold by the government to the plaintiff for £17, was, on the 27th of July, 1850, granted to him as containing 34 acres, be the same more or less, without any other description, and the trespasses complained of

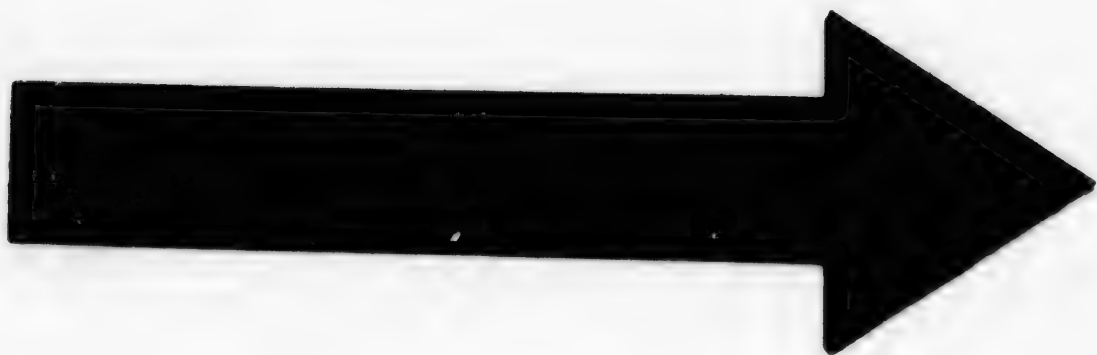
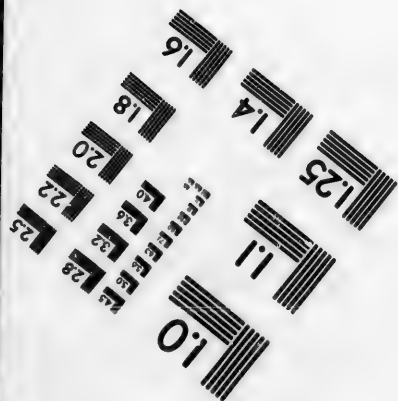
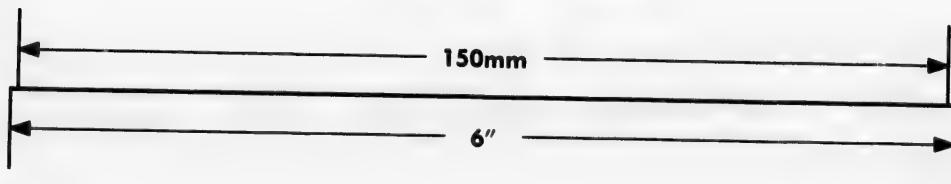
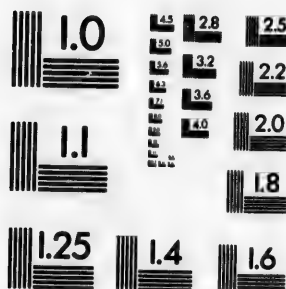
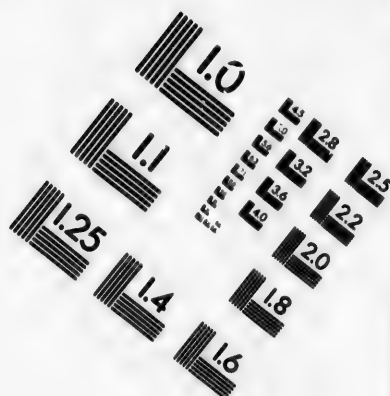
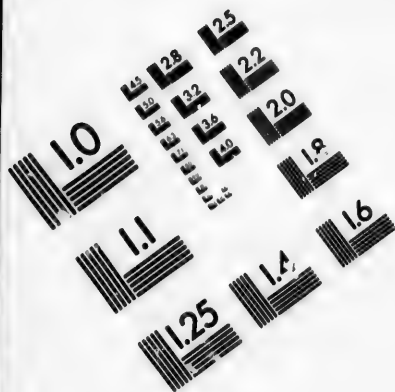


IMAGE EVALUATION TEST TARGET (MT-3)



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1854. are upon the northerly angle of this lot and westerly of the allowance for road between lots Nos. 30 and 31, as laid down in the copy of the government plan produced, from the posts planted at the front angles of 30 and 31, facing the 6th concession, and as contended by the respondent. But the appellant contends that the *locus in quo*, by reason of the jog already mentioned, was included in the grant of land and forms part of lot No. 30, in which event he is not guilty of trespassing upon lot No. 31, and the difficulty was to decide upon the true boundaries of and between these lots, upon the ground.

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McLaughlin

In the first place, the actual possession of the *locus in quo* was disputed; in the second place, whether it composed part of lot No. 31 was contested. With respect to the possession, there was a struggle between the parties, each sowing and planting grain, potatoes, &c., upon the *locus in quo*, and each attempting to reap the same. A Judgment. person named Davidson had erected a shanty upon a part of the premises several years before, having entered as he said, under the appellant, before the respondent came there, and from the contradictory nature of the evidence, so far as the case turned upon possession, it depended upon ownership. Acts of trespass by the appellant were clearly proved, and whether those acts were upon the respondent's possession, depended upon whether they were upon any part of lot No. 31.

Then as to boundaries: three different lines were run by different surveyors, namely, Walsh, Kelly and Prosser. According to Walsh, or Walsh & Dennison's line, the *locus in quo* was clearly a part of lot No. 31, for that line merely extended the allowance for road between 30 and 31, from the 6th concession road on the course of the concession line through to the Adjala road. According to Kelly's line, the principal part, if not all the trespasses complained of, would be upon lot No. 31, for that line appeared to have been traced from the

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centre of the 7th concession to the Adjala road. Commencing at the distance of 80 chains, parallel to the line of the concession road, from the point where a line drawn parallel to the side line, from the post at the S. E. or easterly angle of lot No. 30, (*i.e.*, from the place of beginning called for in the government patent for that lot,) meets the centre of the concession, Kelly's line being, of course, drawn parallel to the side line of the concession. This line passed either through, or very nearly through, Davidson's shanty, in front or rear; the evidence tending to shew that it was in the rear, rather than in the front.

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v.
McLaughlin.

According to *Prosser's* line, the *locus in quo* was all within the limits of No. 30, owned by appellant, and formed no part of No. 31. Consequently, adopting either *Walsh* or *Kelly's* line, the respondent would be entitled to recover, but adopting *Prosser's*, the appellant would be entitled to a verdict. *Prosser's* line was ascertained by tracing from the south east angle of No. 30, or place of beginning, according to the patent, thence to the Adjala road, on the course of the allowance for road between the 7th and 8th concessions, the distance being 14 chains, instead of 10, as called for by the patent, thence along the southerly side of the Adjala road 35 chains, 50 links, the distance (more or less) specified in the patent, thence parallel to the southerly, or concession line 3 chains, 67 links, to the centre of the 7th concession, the patent calling for 1 chain 50 links, more or less, from the Adjala road to such centre, and if the line along the Adjala road were continued in a westerly direction until within 1 chain, 50 links of the centre of the concession, it would encroach still further upon lot 81, as claimed by the respondent, and give the appellant more land than he claimed under the patent. But if 5 chains, 50 links, instead of 1 chain, 50 links, be adopted, in consequence of the excess of 4 chains more than is called for from the place of beginning, to the Adjala road, the length of the line along the Adjala road

Statement.

1854. will be shortened accordingly. According to *Prosser's* survey, the appellant would have 77 acres in No. 30, and respondent nearly 76; his patent mentioning 84 acres, and the respondent's 70 acres, more or less, respectively. If *Walsh's* line was adopted, the appellant would be reduced to 66 acres for No. 30, and the respondent's increased to 81 (some of the surveyors said 83, and upwards) for No. 31, contrary to what the patents specify, and the government plan indicates, from the south-west angle to the north-west angle of No. 30, (in the front of No. 30, on the road between the 6th and 7th concessions,) and to the allowance for road between Nos. 30 and 31 is 34 chains, 38 links, being an excess of 4 chains, 38 links, according to the width attained for the front of full lots throughout the township, but there are what are called jogs, in tracing the side lines from the double front posts to the centres of concessions, as exhibited by the plans produced.

Statement.

The difficulty was, upon what principle or data the limit between lots Nos. 30 and 31, 7th concession, in that part next to the Adjala road was to be determined.

The learned judge who tried the cause, expressed to the jury his approbation of *Prosser's* line, and a verdict was rendered for the defendant. In the following term

Mr. *Hallinan*, for plaintiff, obtained a rule upon the defendant, to shew cause why such verdict should not be set aside, and a new trial be had with costs to abide the events on the ground of the reception of inadmissible evidence; for misdirection, and on grounds disclosed in affidavits filed which, upon argument, was made absolute.

His Lordship, the Chief Justice of the Common Pleas, stated, however, that Mr. Justice *Sullivan*, who had heard the argument, but had died before judgment was pronounced, had entertained the opinion that the line as ran by *Prosser* ought to govern.

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From this judgment the defendant appealed.

Mr. *Eccles* and Mr. *R. Cooper*, for the appellant.

Mr. *Hallinan*, for respondent.

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Dixon
v.
McLaughlin.

ROBINSON, C. J.—The action was brought to try a question of boundary. At the trial before *M. Lean*, J., he considered that upon the facts proved the right was with the defendant, and the jury, in accordance with the opinion which he expressed, found their verdict for the defendant. The plaintiff moved in the following term for a new trial. It was argued while the late Mr. Justice *Sullivan* was a judge of that court, and it appears from what was said by the learned Chief Justice of the Court of Common Pleas in delivering his judgment, that his late brother *Sullivan*, though he took at first a view unfavourable to the verdict, inclined afterwards to the opinion that the case had been rightly disposed of at the trial; and that the survey made by Mr. *Prosser*, was properly treated by the learned judge at *nisi prius* as made upon a more correct principle than either of the surveys upon which the plaintiff relied. Judgment.

Before judgment was given upon the motion for a new trial, however, Mr. Justice *Sullivan* died, and the case was again argued in order to give to the parties the advantage of having the judgment of Mr. Justice *Richards*, who had succeeded him. After taking time for consideration the court gave judgment, ordering a new trial, a majority of the court not agreeing with the view of the case which had been taken by Mr. Justice *McLean*, to which view, however, that learned judge still adhered. This judgment has been appealed from. The case turns upon a legal question which evidently leaves room for doubt, since four judges who heard the point argued seem to have been equally divided in opinion upon it.

The parties are unfortunately involved in an expensive litigation upon rather a small matter.

1854. The defendant holds by a chain of title derived from the Crown, under a patent issued in 1838. The plaintiff holds under a patent made to himself in 1850.

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McLaughlin.

In the defendant's patent, which is the elder one, and which is for the east or rear part of lot 30, in the 7th concession of Albion, the quantity of land is expressed to be 70 acres, more or less. According to the boundaries which he contends for, the area of his land will be about 77 acres, being 7 acres more than the Crown professed to grant by the patent under which he claims. If the limit between this part of lot 30 and the plaintiff's adjoining lot 31 be fixed where the plaintiff insists it should be fixed, the area of the defendant's land would be reduced to 66 acres, being 4 acres less than his patent expresses.

The plaintiff's patent for lot 31 calls the quantity 34 acres, for which he paid the government £17, but if the line between him and the defendant be fixed according to the survey which he seeks in this action to establish, the area of his lot would then be 83 acres and 20 perches, being an excess of 49 acres above what his patent expresses. If the boundary between him and the defendant should be established where it would be according to the survey on which the defendant relies, the plaintiff would still have nearly 76 acres, being 42 acres more than his patent expresses, and more than he paid for to the government.

It will be seen, therefore, that the plaintiff is not a little unreasonable in what he is contending for, still if the law is with him, it is in his discretion to insist upon it, and we have no right to withhold from him any portion of what he may in our opinion have shewn himself to have been legally entitled to.

When I speak of the quantities of land expressed to be granted by the respective patents, it must be borne

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in mind that those quantities are stated in each patent with the qualifying words "more or less." This shows want of certainty at the time of making the grants as to what the exact area of each tract might be found to be, as laid out upon the ground; and this in most cases where the variance turns out to be small, makes the fact of variance of little weight as an argument on one side or the other. When the variance is so remarkable and so striking, however, as it would be in the present case if the plaintiff's claim should be upheld, it does seem to afford strong ground for inferring that what is contended for in any such case must be inconsistent with the intention of the Crown in making the grant, and this should make us apprehend that the claim is grounded on a fallacy, and that something is assumed as a foundation for the construction insisted upon, which cannot be reconciled with the original plan of survey.

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Yet we have seen instances, and those not a few, in which the undeniable application of legal principles, and of the provisions of our provincial statutes which have been passed for settling these disputes, has driven the court to a decision very much at variance with what has seemed to have been the understanding and intention of the government in making the grant. The provincial statutes to which I refer are excellent, I think, in their intention, and have been framed with judgment in a true spirit of equity, but like all other general rules, they will occasionally, in their application, produce hard cases. I mention this only to shew that the effect which a decision in favour of the plaintiff must have in so unreasonably increasing his quantity of land, cannot be taken as sufficient to prove his claim unfounded, though it may well suggest a strong doubt that on close examination it will be found to be so.

Judgment.

The 37th and 44th clauses of our last statute for adjusting disputes in regard to boundaries, (12 Vic., ch. 35,) shews very clearly, that where townships have been

1854. surveyed, as the township of Albion was, with double fronts to each concession; that is, with a range of posts to mark the limits of lots in the rear of the concession as well as in the front, that shall be assumed to have been done with the intention of issuing patents for the front halves and rear halves separately to different grantees, as if they were distinct lots, and as the posts planted with this view along the rear of the lot in each concession will in such cases mark the front of the rear half, and will be taken to define the limits of the half lots by those who settle upon them, the legislature have thought it right to make express provision in such cases for securing the patentees in the enjoyment of the land between the posts planted to mark the front angles of each rear half lot; and they have done this by providing in effect that the front halves and rear halves shall be treated, as if laid out separately like distinct concessions, so that the limits of the rear half lots shall not be subject to be controlled by side-lines drawn from the posts set to mark the front halves of the same lots nor *visa versa*, but in ascertaining the limits between any two lots in either range, the range of front halves and the range of rear halves are to be surveyed and dealt with separately, as being independent of each other, in the same manner as the several concessions are.

Judgment.

Then bearing this in mind, we are to take up the defendant's patent, which is the elder one; and we see that the Crown granted to the person from whom he traces his title, the rear or east half of lot 30, in the 7th concession, supposed to contain about 70 acres, describing it by metes and bounds, the Crown at that time owning whatever land remained in that concession beyond this lot 30, and therefore being at liberty to convey to the grantee what it pleased, without danger of interfering with any one as the owner at that time of lot 31. The description commences at the south east angle of the rear or east half of lot 30, which angle is admitted to be known and undisputed, so that we have the advan-

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tage of a certain fixed starting point: then we are to go on a certain course 10 chains, *more or less*, till we reach the town line of Adjala: there again we have a certain point to go to, for the position of the town line of Adjala is known and undisputed, having been actually laid out in the original survey, and been since opened, and having posts placed along it wherever the several concession lines of Albion intersected it.

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The distance turns out to be 14 chains, instead of 10 as expressed in the patent; but that occasions no difficulty, for the distance is not given as an absolute one, and we are to proceed in the course named till the town line is reached. The great difference, however, between the actual distance from the post planted by the surveyor and the town line, shews that the government either from the plan returned by the surveyor not corresponding with the work on the ground, or for some other cause, seem not to have had the means before them of giving a precise and accurate description. Judgment.

So far, however, there is no difficulty in carrying out the description that was given. The whole occasion for doubt arises from the next boundary line, which is to run "South, 74° west, along the Adjala line, 35 chains 50 links, *more or less*, to the allowance for road between lots 30 and 31;" thence the description proceeds south, 39° west, 1 chain 50 links, *more or less*, to the centre of the concession, thence along the centre line of the concession to the southern limit of the lot, and thence to the place of beginning. I have gone through the whole description in order to place in view the doubt that arises upon the extent of the line along the Adjala road, and to shew how it applies. Now returning to the last established point, we are to go along the Adjala town line 35 chains and 50 links, *more or less*, to the allowance for road between lots 30 and 31. The defendant says, and says truly, there is no allowance for road marked out and visible on the ground,

1854. between lot 31 and the rear half of lot 30. If you could shew me such an allowance, I should have a right to go there and could go no farther along the town line, whether the distance should be more or less than 35 chains and 50 links. It is admitted that no allowance for road between the rear half of lots 30 and 31 was marked out on the ground in the original survey, or had any posts set to mark its position either upon the centre line of the concession, or upon the Adjala town line.

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We have abundant means of knowing, judicially and otherwise, that this is not expected to be done in any such survey, except where the allowance for road along such rear half would terminate upon a concession line in rear, and then the road would be marked by the posts which would be set on such concession line to mark the angles of the lot on each side of it.

Judgment. The division line between the rear halves of lots 30 and 31 happening to terminate at the northern front of this range of half lots, and not upon any concession line, but upon the external boundary of another township which it strikes obliquely, no post was planted in the original survey to mark the intersection of either lot with the Adjala town line. If there had been such posts, they would have served to mark the allowance for road between the two lots, as well as the angles of the lots themselves, and the present dispute would not have arisen.

The plaintiff does not deny the fact that no side road between the rear half of lot 30 and lot 31, or allowance for such side road, is to be found either in use or marked out upon the ground, nor has he endeavoured to prove that any such road allowance was actually run out, or its position in any way marked out in the original survey, or by any public authority before the patent issued. But he insists, that as none such can be traced as laid out by authority between the east or rear half of lot 30 and the

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adjoining lot, we must be guided by the allowance for road that was laid out between the west or front halves of lots 30 and 31 in the same concession, and that we must produce that allowance northerly to the town line of Adjala, and adopt that as the road allowance between the rear half of lot 30 and the adjoining lot.

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We cannot do that, I think, because it would be in direct opposition to the 37th clause of the Survey Act, which was framed to meet such cases, and it would in fact produce, in this instance, the very injustice which that enactment was intended to prevent. The two ranges of half lots having been run, and the lots posted independently along each end of the 7th concession, it has happened in this case, as in all others where a survey has been conducted on this plan, that lines drawn from the angles of the lots on each end towards the centre, will not meet exactly at the centre as they ought to do. Inequalities of the ground, and other natural obstacles, and sometimes the carelessness of chain bearers, or peculiar local attraction of the compass, will sometimes produce great differences, and there will never be an exact coincidence, but always more or less of a jog or shoulder in the centre line where the lines ought to meet. That is the case, we see, in regard to this concession. The part of lot 30 which is west of the centre line has been laid out on the ground some 6 chains and more further south than the part east of the centre line. If the southern side line of the west half of lot 30 were to be protracted to the town line of Adjala, it would cut off a large portion of the rear of lot 29 and throw it into lot 30, but it is quite clear that cannot be done. The defendant can obtain no indemnity on that side for the 6 chains he will lose on the northern side of his tract, if he is to be bounded by the allowance for road, being produced contrary to the statute, from one front of the concession to the other. The plaintiff, I think, attaches a wrong meaning, and gives in consequence an undue importance to the reference which is made to this part of the description,

Judgment.

1854. *"the allowance for road between lots 30 and 31."* I do not look upon those words as intended to refer to any thing that would be certainly found upon the ground, and that would therefore serve as a guide to shew the breadth of the lot. They were merely inserted to shew that the allowance for road was intended to be excluded from the patent, and therefore that this line along the town line of Adjala was not to be carried full up to the side line of lot 31, but that a chain was to be allowed between the lots for a road.

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McLaughlin.

We are not to look for this allowance for road in order that we may find where the lots are; but we are first to find *the angle of either of the lots*, and then we shall know where the road is to run.

Judgment. In most townships an allowance for roads between lots, by which people may pass from one concession to another, is made only along every fifth lot, and according to the copy of the government plan produced in evidence, that is the case in this township. It happens that one of these allowances falls between the lots 30 and 31, and it is noticed in the description, in order that it might be seen that the government were not including the road in their grant, and that the grantee may carry his line to the road allowance only, and not across it. If there had happened to be no allowance between these two lots, then the boundary line which gives rise to this law suit would no doubt have been described thus: "then south 74° , west along the Adjala line 36 chains, 50 links, more or less, to the limits between lots 30 and 31, and the question would have been, how to find that limit, which appears to me to be in effect the same question that is before us now, and it could not, I think, have been solved by producing the division line between the front or west halves of 30 and 31, for that would have been contrary to the principle established by the 27th clause of the statute 12 Vic., chap. 35. If we could not have fixed upon the limit between the lots in

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the rear by this process, neither can we determine in that manner the position of the allowance for road, for the latter is a mere accessory to the former, and dependent upon it. It is as if the description had run thus: "then south 74° west, along the Adjala town line 35 chains, 50 links, more or less, to within one chain of the limit between lots 30 and 31, being the allowance for road," or, as we have seen in some patents, "to the limit between lots 30 and 31, leaving out the allowance for road

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McLaughlin.

Then comes the question, if we are not permitted to fix the boundary line between 30 and 31 in rear, by producing the allowance for road at the front of the concession, how are we to ascertain it? And here I feel the full force of the difficulty which has been stated by some of my learned brothers, that there is a want of any thing definite and precise throughout the description; after reaching the Adjala town line, we are told to go 35 chains 50 links, *more or less*, to an allowance for road, which the government may have supposed had been laid out, and would be found marked upon the ground, but no such allowance is to be found there, and thus the distance is rendered vague and uncertain by the line being appointed to terminate at something which cannot be pointed out. There is some appearance at first sight of a tendency in the next expressed boundary to render this last definite and certain, then south 39° west, 1 chain 50 links *more or less*, to the centre of the concession, but then again, the value of the expressed distance of 1 chain and 50 links, as a means of solving the difficulty, is destroyed by the introduction of the words *more or less*. If the distance had been given in absolute terms, then we should have known that the previous boundary was required to be carried westerly along the Adjala line till we came to a point distant 1 chain and 50 links from the centre of the concession, and that would have been a direction easily followed; but the qualification of "*more or less*" shews that there was an uncertainty as to what

Judgment.

1854. might be the distance between the Adjala town line and the centre of the concession at the point where we are to leave the town line, inasmuch as the length of the boundary along the town line had not been absolutely stated. The western angle of 30, not being marked by any monument planted on the town line in the original survey, there is nothing there, and certainly nothing in the centre line of the concession, to shew us where the allowance along the rear side line of 30 is to be, so that in effect we are told to go along the town line as far as may be necessary to reach an undefined and unknown point, which will be found to be at an undefined and unknown distance from the centre line of the concession.

Judgment. But taking this to be literally so, and admitting the objection of vagueness and uncertainty to apply with as much force as possible, even so as to compel us to give up in despair the attempt to fix the limit between the two lots, that would certainly not be decisive in the plaintiff's favour. His later patent for 31 gives no description of that lot, but merely calls it by its name, and in effect makes its boundary to depend upon the limits of lot 30, which the Crown had previously granted, and when we see that this patent assumes to convey only about 34 acres to the plaintiff as the extent of his lot 31, he is bound to shew something more than that the limit of lot 30 is uncertain, before he can call upon a jury to dispossess the owner of that lot of any land in order to swell the contents of the plaintiff's lot from 34 to 83 acres. So long as we cannot tell with precision where the northern limit of 30 is, we cannot pronounce how far the southern limit of 31 should be carried, and the benefit of any doubt ought surely not to be given to the one who already occupies more than twice the quantity of land that he had reason to expect was comprehended in his patent.

The plaintiff, however, does ask to have a certain process applied which, if it can be admitted, would fix the

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division line with precision. He insists on having the allowance for road carried through from the front, and that the defendant shall be compelled to abide by that, although from his southern side line not tallying with the side line of the front half of lot 30, he would lose six chains in width along his whole tract by being made to range with the front of lot 30 on one side, while he is not allowed to range with it on the other. If this be the law, we must admit it to be a hard law; but I do not think that the defendant can be placed in that unequal position consistently with the spirit or letter of the survey act.

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What the plaintiff seems chiefly to rest upon for supporting his claim is, that inasmuch as only one angle of the rear half of lot 30 was marked by a monument on the concession line, and no monument was placed to mark the western angle, nor any monument was placed at the north east angle upon the concession line, it cannot be said that this concession was surveyed (in the words of the 37th clause) with double fronts, because so far at least as this part of the concession is concerned, posts were not planted on both sides of the allowance for road at each end of the concession, and so there are not posts at the rear end of lot 30; that is, not a post at each angle from whence lines can be drawn to the centre of the concession to form its limits on both sides. No doubt that is true, because the 8th concession line, near the centre of lot 30, is merged in the township line, and the 8th concession runs out and ends there, and there would be no further posting along that concession. Judgment.

But it is not the less true that the 8th concession was run with a double front, and that posts were planted at both sides of these allowances for road between the 7th and 8th concessions, and at both ends of these allowances where they reached from one concession to the other.

This lot 30 was not in fact an exception, because

1854. there was not and could not be any allowance for road leading across from the 8th concession to the centre between lots 30 and 31, the concession having terminated near the middle of lot 30. Should it then follow that this lot 30 is taken wholly out of the operation of the 37th clause, not because it was not a concession surveyed with double fronts, (because unquestionably it was, so far as it was possible in the nature of things,) nor because this allowance for road was not marked at the rear of the 8th concession as well as the front, because the surveyor who had laid out Albion had done with the 8th concession and had finished his survey in that direction, before he had reached or could reach any such allowance for road. It is quite true that it has followed as a consequence, it seems, that no post or posts have ever been planted to mark the limit to the westward of the rear of lot 30, or the termination to the northward of the allowance for road.

Judgment. And this being so, the defendant argues that we cannot treat the eighth as a double-fronted concession any further than the south side of this lot 30. It is true the 37th clause cannot be literally carried out so as to find the northern side line of the rear half, by running down a line from an original post on the north side to the centre of the concession, because there has never been any post planted there. But I do not think it follows from thence, that the front and the rear range of lots in the 8th concession are not to be treated through its whole length irrespective of each other, or that being so to the prejudices of the defendant when the survey has placed his portion of lot 30, six chains and more to the south of the front half of that lot, he can be controlled by the post placed on the north side of lot 30 in front, and thus prevented from gaining on the one side what he has lost on the other.

The principle of double fronts must apply throughout the concession, as it seems to me, or not at all; I mean it cannot be carried through in regard to all the lots but

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the last; and then because no post is to be found at one of the rear angles of the last lot—the old principle of the front angles on a concession governing throughout, be adopted in its place. This could hardly fail to be unjust in its operation generally, as it certainly would be in the present case; and the legislature could never, I believe, have intended it. The negative effect of their act still continues, I think, that you shall not take the front posts of the whole lots, because where that was not the case, the front posts ought not in reason to govern through the whole extent.

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It is only by having the survey of *Walsh* confirmed, which was made upon the principle of producing the allowance for road from the front, in order to govern the limit of lot 30 in the rear, that the plaintiff can expect to succeed, for the other surveys made upon the idea of an equitable compromise were not capable of being sustained either under the statute or the language of the patent.

Mr. *Walsh* seems not to have had entire confidence in his method of bounding the defendant's lot, for he admits that while he made his survey at the plaintiff's request, before the plaintiff had obtained his grant, in order to shew him what land would come under the description of lot 31, in case he should make the purchase from the government, yet he recommended him not to pay for that part of the land now in question, which would be cut off by producing the allowance for road from the front; and Mr. *Walsh*, when questioned, seems not to deny that when he first saw the defendant's patent, he told him if he had been aware of its terms before he made his survey, he would have run his lines differently.

It is quite natural for the plaintiff to ask how the northern boundary of the rear front of lot 30 is to be determined, if no allowance for road was ever laid down between it and 31 in the rear half of the concession, and

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if no attention is to be paid to the position of the road allowance in front. The question may be one difficult to answer, and it is evident that the surveyors were all perplexed by it, but it must be recollected that the plaintiff would not prove his case if he should merely shew that there is an insuperable difficulty in fixing upon the true boundary between him and his neighbour—he must establish more than that to enable him to dispossess the defendant. Already the plaintiff has more than double the quantity of land that the government professed to sell to him, and before he can increase the excess at the expense of the defendant, he must shew conclusively where the true boundary is between his land and the defendant, and must shew that the defendant has gone beyond it. He does not shew this, I think, when he insists upon those words of the patent, “to the allowance for road between the said lots 30 and 31,” as being the only words that can be of use in determining the question, because there is no such allowance in the rear, of which the position can be pointed out, and the allowance between the lots in the front range has nothing to do with the question. If, however, the learned judge who presided at the trial was right in his opinion upon this point, as I think he was, it does not follow that the patent is necessarily incapable of receiving such a construction as will settle the boundary. It is by no means a new case that a patent should give a distance, as this does, expressed in chains and links, but with the addition of the words “more or less,” and referring to something erroneously supposed to exist, by which that which is apparently uncertain, is to be controlled and rendered certain. We have often had before us, in other cases, patents containing descriptions in which one or more of the boundary lines were thus stated, “so many chains, more or less, to a post marked,” &c., where it appeared that no such post could be found, nor its position in any manner proved, and where it was even stated to be certain that no post was ever planted to mark the point. In such cases the distance must from necessity be taken

Judgment.

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If the patent for lot 30, instead of referring to an allowance for road had run thus: "south 74° west, 35 chains and 50 links, more or less, to a cedar tree, or to the bank of a small stream, and it were made to appear that there was no sign or traces of a cedar tree, and nothing like a stream in that part of the township, we could only then be governed by the 35 chains and 50 links, and must take that rather than hold that the patent granted nothing. I consider the effect of the manner in which this line is laid down in the patent is that you are to go on the course mentioned, 35 chains and 50 links, unless you find that you sooner come to the allowance for road between lots 30 and 31, in which case you are to stop when you get there; or if you find that the distance to the allowance is more than 35 chains 50 links, you are still to go to the allowance, which, wherever you may find it, is to be your guide and not the distance expressed. In other cases of this kind where the object referred to is not to be found, courts have held that the distance mentioned must of necessity govern the length of the line, and we must hold the same in this case. Judgment

Mr. *Hallinan* on the part of the plaintiff has urged upon us that as we find in regard to this lot no double front posted, and so no allowance laid out in the rear of the concession, we should take the government plan of original survey as our guide as to where that allowance was intended to be, if we cannot let the line be produced from the north side of lot 30 in the front of the 7th concession. But we can no more do that than allow the front lines and posts to govern the rear, if it is right to hold that the 7th concession is within the 37th clause of the statute, as being a concession surveyed with double fronts.

To be governed by the map in such cases would

1854. *Dixon v. McLaughlin.* always produce confusion, and would always defeat the intention of the act, since it is quite certain that the surveyor in every case means to lay out on both ends of the same concession an equal number of lots of the same width respectively, and his plan only represents his scheme of survey, not his actual work on the ground, with all its imperfections. In all such cases the lines would be found to be laid down straight from front to rear as if they had been chained through. But we know that all that is done upon the ground is to chain off the lots on each front and set posts; no lines are run from either end to the centre in the original survey, and when this comes to be done afterwards for the purposes of individual occupants it is always found that the lines do not exactly meet. They would never do so when each front of the concession has been separately posted; and the jog, as it is commonly called, is often very considerable. It was a conviction of this that led to the provision made by the legislature, which is certainly equitable and convenient.

Judgment.

It does not seem to me that the question presented in this case is a new one. We have often had before us cases in which the description in a patent has referred to monuments which were assumed to have been planted, but which in fact were not, and where, in consequence, it has been considered that the expressed distance must govern though qualified by the words "more or less," to a post marked, &c. We have also seen cases in which owing to the interference of a small lake or marsh, one angle of a lot was not marked on the ground by any post or monument, though the other angle was marked out. In such cases, before the statute of 1849, I suppose the only course would have been to give the lot its width expressed in the patent, though since that act the width would be determined by dividing equally the space between the nearest two ascertained monuments upon the concession line. The survey of this township having been made after that statute, the surveyor must have

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known that the front angles were expected to be marked, and that these half lots were to front on the 8th concession line, and to be laid out independently of the half lots in front. Why he did not think it necessary to mark both the side limits of this half lot in front I do not understand, for there was no difficulty in doing it, and it was not the less necessary because the front of lot 30 happened not to be a straight front, but to follow the deflection occasioned by the Adjala town line. The government seems naturally to have assumed that posts had been set on that town line to mark the fronts of the lots to the end of the range. If such posts had been set, then they would according to the scheme of survey have marked an allowance for road between the angles of 30 and 31, on the town line, and such marking down of the road would have been conclusive for ever as to the position which it must occupy, unless changed by some legislative measure.

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The Surveyor-General, I suppose, judging from the plan of survey that had been returned to him, assumed that this allowance for road would be met with at the end of about 35 chains and 50 links on the town line, and the description was framed in such terms as to make the actual position of the road a limit which must necessarily govern whether the distance should be found to correspond actually or not.

Judgment.

But there having been no road marked down in fact, and so nothing to check the expressed length of the line, that must be carried out, and will determine the position of the road, instead of the allowance for road determining the width of the rear end of lot 30, as it would and must have done if posts had been planted in the original survey to mark it.

It is wholly inconsistent, I think, with both the spirit and letter of the 87th clause of the statute 12 Vic. ch. 35, that the side-lines of either of the two ranges of lots

1854. in a concession which has been laid out upon the plan of having double fronts, should be governed by the lots in the other range; and it is clear that the allowance for road between lots in the one range must in like manner be independent of the allowances between lots in the other, because those allowances are nothing more than the space of a chain reserved between the two lots, the position of the reservation must follow the position of the lots, and must depend upon the principle which you are at liberty to adopt for fixing the boundaries of the lots: and it is in my opinion out of the question that we can allow one side of a lot which has been laid out in a double fronted concession to be governed by the side line of a lot on the other side of the centre, unless we can allow the other side to be governed by the same principle, which we certainly cannot do in this case as regards the southern side of lot 30.

Judgment. For these reasons I agree with the learned judge who tried the cause in thinking that, under the circumstances, the term in the description which refers to the allowance for road between 30 and 31 in rear, can have no effect, because there being no evidence that any such allowance for road was in fact laid out and marked upon the ground, we have no proof of its position, or rather I should say of its existence, and we are not authorised to establish its position by protracting to the rear of this concession the allowance for road that is marked by the posts planted in front, any more than we could take as our guide the allowance for road between lots 30 and 31 in any other concession of the township. The correct course under the circumstances, I think, is to be governed by the expressed distance of 35 chains and 50 links, and not to go beyond that along the township line, in order to reach the point which is distant 1 chain and 50 links from the centre of the concession, because that is not a distance given in absolute terms, but with the qualification of "more or less," being founded on a conjecture confessedly uncertain as to the probable position of the

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road allowance. There being no proof of any road allowance we can only take the distance, and that necessarily fixes the position of the road allowance which had not been fixed before, for it is clear there is to be the usual width of an allowance for road between lots 30 and 31 in rear.

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It follows that the judgment of the court of Common Pleas upon the application for a new trial, which proceeded entirely upon a legal question, must be reversed, and the rule *nisi* for a new trial discharged.

MACAULAY, C. J.—In the observations I am about to make, in addition to what I said in the court below, I wish to be understood as meaning by the word “north,” that part of the township of Albion which is bounded by the Adjala road; by the word “south,” that side of the township, or end of the concession from which the lots are numbered; by the word “east,” that part of the 7th concession or of the half lots in that concession which front on the allowance for road between the 7th and 8th concessions; and by “west,” that part of the 7th concession, or of the half lots in that concession, which front on the allowance for road between the 6th and 7th concessions.

Judgment.

It still appears to me the question does not depend upon the patents, but upon the original survey and the statutes. It might have arisen before the issue of any patent for the defendant's lot No. 30, or for either lot, as if all the other lots had been granted except these two, and the inhabitants had opened the road directly through, and, as for the east part, an information of intrusion or an indictment for an obstruction was prosecuted. And I look upon the patent for No. 30 material only as confirming what the plan of the original survey imports, namely, that there was a part of lot 31 lying between the centre of the 7th concession and the Adjala road to the east, with an allowance for road between the east

1854. parts as well as the west parts of Nos. 30 and 31. Without the patents, the original or government plan, and I suppose the field notes, had they been produced in evidence, shew that a continuous allowance for road was made between those lots from their west front to the Adjala road. Whether any part of either lot extended beyond the centre line of the concession, so as to leave an east part as well as a west part divided by such centre line, would depend upon the original survey as ascertained upon the ground. Upon the ground, posts were planted at the south-west angle of No. 30, at the allowance for road between Nos. 30 and 31 on their west front, and at the intersection of the 6th and 7th concession road with the Adjala road, or the north-west angle of No. 31; also at the south-east angle of No. 30, and at the intersection of the 7th and 8th concession road with the Adjala road, forming the north-east angle of the said lot No. 30; but no post was planted on the Adjala road to mark the allowance for road, or limit between the east parts of Nos. 30 and 31 on that road. That was to be determined by the information afforded by the plan, field notes, and the posts that were planted to indicate the boundaries of these lots. When those posts are examined and the distances measured, I understand it turns out that the west front of No. 30 exceeds 30 chains (the proper width of a lot) by $4\frac{1}{2}$ chains, and that there is also an excess in the west side of No. 31, but to what extent was not proved. It also turns out that the post at the south-east angle of No. 30 is not opposite the south-west angle of that lot on the course of the governing line of the concession; but is to the north of it $6\frac{1}{2}$ chains; and that the distance from the south-east angle of No. 30 to the Adjala road is 14 chains. It is to be remembered that the depth of the concessions in this township are 66 chains 67 links, or 33 chains $33\frac{1}{2}$ links for half the concession, which by 30 chains for the width of lots would make full or half lots of 200 and 100 acres respectively.

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Judgment.

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The provincial statute 50 Geo. III., ch. 1, sec. 12, 1854.
 which is still in force, enacts that all allowances for roads Dixon
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made by the King's surveyors in any town, township or
place already laid out, or which shall be made in any town,
township or place within the province, &c., shall be
deemed common and public highways, &c., unless altered
as therein provided.

The 38 Geo. III., ch. 1, does not seem applicable, but
 the 59 Geo. III., ch. 14, has always been treated as
 declaratory and prospective as well as retrospective, and,
 though not particularly mentioned in the evidence, the
 township of Albion was no doubt surveyed and laid out
 after the passing of that act, and before the 12th of
 October, 1838, the date of the patent for the east part of
 No. 30. From the time of the original survey, and at
 the date of that patent, and until the passing of the 12
 Victoria, chapter 35, (3rd of May, 1849,) the determina-
 tion of the present question depended on the 50 Geo. III., Judgment.
 ch. 1, sec. 12, and 59 Geo. III., ch. 14, secs. 2 and
 9. The 2nd section declared the unalterable bound-
 aries of townships, concessions, and lots; and section
 9 enacted that the front of each concession, lot, or
 parcel of land should be considered to be, and was
 thereby declared to be, that end or boundary of such
 concession, lot, or parcel of land which was nearest
 to the boundary of the townships from which the several
 concessions thereof were numbered.

This act said nothing of alternate or of double fronted
 concessions, both of which are mentioned in the 12 Vic.,
 ch. 35, secs. 37, 38.

The omission was specially provided for in the town-
 ship of Osgoode, by the 10 and 11 Vic., ch., 54, passed
 in the year 1847, and amended by 13 and 14 Vic., ch.
 36, which restricts its operation to certain concessions.
 That township had been surveyed in concessions with
 double fronts, whether before or after the passing of the 59

1854. Geo. III., ch. 14, I am not aware. The act of 1847 at the special instance of the inhabitants, enacted that the side lines should be run from the posts planted on one side of the concession to those on the other of corresponding numbers, &c., without regard to jogs, in order to provide direct roads through the concessions, although the effect would be, to prevent the side lines being run parallel to the governing side line of the concessions. This act, though local in its object, is material as indicating that each side line of a concession laid out with double fronts and granted in half lots, was in the intent and meaning of the 59 Geo. III., ch. 14, to be regarded as the front of each half concession respectively; and that the side lines should be consequently run from the posts planted to mark the front angles of the half lots on each respective front to the centre of the concession parallel to the governing side line. It is probable this had always been considered the proper course in townships so laid out.

Judgment.

Then looking at the present question, after the township of Albion had been thus laid out, what was the allowance for road or division between the east parts of Nos. 80 and 81, 7th concession, lying between the centre of the concession and the Adjala road, before the grant of 1838, or between that period and the passing of the 10 and 11 Vic., ch. 54, and 12 Vic., ch. 35 respectively :

The 12 Vic., ch. 35, sec. 35, enacts, that the course of the boundary line of each and every concession on that side from which the lots are numbered, shall be and is declared to be the *course* of the division or side-lines throughout the seven townships and concessions in Upper Canada respectively.

(1.) Provided that such division or side-lines were intended in the original survey to run parallel to the said boundary.

(2.) Provided also, that when the end of a concession

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from which the lots are numbered is bounded by a lake or river, or other natural boundary, or when it has not been run in the original survey, &c., or when the course of the division or side-lines of the lots therein was not intended in the original survey to run parallel to such boundary, the said division or side-lines shall run parallel to the boundary line at the other extremity of such concession, provided their course was intended in the original survey, &c., to be parallel thereto, and that such boundary line was run in such original survey.

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(3.) Provided, further, that when in the original survey, &c., the division or side-lines were not intended to run parallel to the boundary line at either end of the concession, they shall be run at such angle with the course of the boundary line at that end of the concession from which the lots are numbered, as is stated in the plan and field-notes of the original survey of record in the office of the commissioner of Crown lands, &c., or if neither of the aforesaid boundaries were run in the original survey, or if it be bounded at each end by a lake or river, or other natural boundary, then at such angle with the course of the line or front of the said concession as is stated in the plan and field-notes as aforesaid.

Judgment.

(4.) Provision for cases of two or more proof lines, &c.

(5.) Provides for sections surveyed under Order in Council of 27th of March, 1829.

Sec. 86 enacts that the front of each concession in any township where only a single row of posts have been planted on the concession lines and the lands have been described in whole lots, shall be considered to be, and is declared to be, that end or boundary of the township from which the several concessions thereof are numbered.

(1.) Provided that in those townships which are bounded in front by a river or lot, where no posts or other

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boundaries were planted in the original survey on the bank of such river or lake to regulate the width in front of the lots in such broken front concession, the division or side-lines of the lots in such broken front concession shall be drawn from the posts or other boundaries on the *concession line in rear thereof*, parallel to the governing line determined as aforesaid, to the river or lake in front.

Judgment.

(2.) Provided also, that when the line in front of any such concession, (*i. e.*, in any township first above-mentioned,) has not been run in the original survey, the division or side-lines of the lots in such concession shall be run from the original posts or monuments placed or planted on the rear line thereof, parallel to the governing line determined as aforesaid, to the depth of the concession, that is, to the centre of the space contained between the lines in front of the adjacent concession, if the concessions were intended in the original survey to be of an equal depth, or if they were not so intended, then to the proportionate depth intended in the original survey, as shewn on the plan or field-notes thereof of record in the office of the commissioner of Crown lands, having due respect to any allowance for road or roads made in the original survey; and that a straight line joining the extremities of the division or side-lines of any lot in such concession, drawn as aforesaid, shall be the true boundary of that end of the lot which has not been run in the original survey.

The last proviso seems to me equivalent to the 37th section, respecting cases where alternate concession lines only have been run.

Sec. 40. That in all cases when any land surveyor shall be employed in Upper Canada to run any other-side-line or limit between lots, and the original post or monument from which such line should commence, *cannot be found*, he shall obtain the best evidence, &c., respect-

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ing such side-line, post, or monument; but if the same cannot be satisfactorily ascertained then he shall measure the true distance between the nearest undisputed posts, limits, or monuments, and divide such distance into such number of lots as the same contained in the original survey, assigning to each a breadth proportionate to that intended in such original survey, as shewn on the plan and field-notes thereof of record in the office of the commissioner of Crown lands. And if any portion of the line in front of the concession in which such lots are situate, or boundary of the townships in which such concessions are situate, intended in the original survey to be straight, shall be obliterated or lost, then the surveyor shall run a straight line between the nearest points or places where such line can be clearly or satisfactorily ascertained, and shall plant all such intermediate posts or monuments as he may be required to plant in the lines ascertained, having due respect to any allowance for a road or roads, &c., set out in such original survey, and the limits of each lot so found shall be taken, and is declared to be the true limits thereof, any law to the contrary, &c.

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Judgment.

Before the patent of 1838, I apprehend that, whatever might be the legal course to be adopted in relation to full double fronted lots, the allowances for side roads or for division or side lines between broken lots at the extremity of the concessions, would be from the west or proper fronts through to the Adjala road, and that this rule would be applied not only to the allowance for road between Nos. 30 and 31, but to all side roads and division or side lines of the broken or incomplete lots bounded by the Adjala road along the whole of that side of the township. The provisoes in the 35 and 36 sections of 12 Vic., ch. 85, seem to me to aid this view—posts planted in the rear of concessions being thereby made to govern where no front posts had been planted in the broken fronts of lots owing to lakes or rivers. And although no provision is expressly made therein except

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as to the courses of the side lines in townships or concessions whose ends are so broken, or which seem to me tantamount, not bounded by the governing course, owing to a diagonal road allowance running between adjacent townships, and cutting or bounding the lots on that side, still I think the cases therein provided for and the present are analogous. Those sections however are intended to prescribe the courses of the side lines between lots rather than the points from which such courses are to be run.

Judgment.

It is section 32 that more immediately applies, by enacting that all boundary lines of townships; all concession lines, *governing points*, and all boundary lines of concessions, &c., and all side lines and limits of lots surveyed, and all posts or monuments which *have been* placed or planted at the front angles of any lots or parcels of land, &c., shall be and are declared to be the true and unalterable *boundaries* of all and every such township, concession, lot, or parcel of land respectively, whether the same shall upon admeasurement, be found to contain the exact width, or more or less than the exact width expressed in any letters patent, grant, &c., in respect of such township, concession, lot, &c., and such township, concession, lot, &c., shall embrace the whole width contained between the front posts, monuments, or boundaries, planted or placed at the front angles of any such township, concession, lot, &c.

The whole scope of that section and of the act shews that the original survey was to control the patent, and not the patent to control the survey; and that the patents or grants are to be applied by reference to the original survey, posts, &c., as found upon the ground; or failing these, by reference (if need be) to the government plan and field-notes of the original survey of record in the office of the commissioner of Crown lands; and not to the descriptions contained in the Crown grants.

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of the east part of lot No. 30 were at the south-east angle and the Adjala road, 14 chains apart. The only posts planted to mark the front angles of No. 31, were at its south west and north-west angles—no post is planted to define the limit or allowance for road between the east parts of these lots on the Adjala road. It is not contended that the east part of No. 30 is to be determined by lines drawn from its south-east angle, and its north-east angle where it intersects with the Adjala road, respectively, to the centre of the concession, which would form a block of 14 chains by 33 chains and $33\frac{1}{2}$ links, and reduce the tract much more than in my opinion it ought to be reduced; and still why should it not be the limit according to the double front rule contended for? I do not, however, think such a construction should be placed upon the statute (though perhaps literally it might) as would limit No. 30 to its east front of 14 chains, because the post planted at its north-east angle at the Adjala road was not intended to determine its full width as a complete front. But from that point the front ceased, and it became a broken or incomplete lot, just as No. 31 was, measured from the opposite point.

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Judgment.

The northerly or upper part of No. 30, and the easterly part of No. 31, are not indicated by any posts actually planted, so that the division line or side road between the east parts of these lots depends upon construction.

In the first place I do not consider the lots as if in separate concessions. They are not so in fact. The statute does not declare double fronted concessions to be separate concessions even though granted or described in half lots. There is no allowance for road between the respective halves, and if regarded as in effect double concessions not divided by a road between them, I think there is much in the provisions to the 12 Vic., ch. 85, secs. 85, 86, already referred to, to shew that the allowance for road separating the easterly parts of lots 30

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and 31 must be the allowance made on their west front continued to the Adjala road. I consider it a question of intention, and it appears clear to me that the allowance for road made on the west side or end of those lots was intended to be so made, not to the centre merely, but to the centre if the half lots on the east side of the concession proved full lots, if not, then to the Adjala road or to the end of the township in the direction of that road. I think this the manifest intention of the government surveyor who made the original survey, in relation to all the side roads or limits between the broken lots throughout that side of the township.

Judgment

In the next place I cannot think the area or contents of the lots in acres, according to the patents or plan, conclusive. The grant for the east part of No. 30, in 1838, describes it from the original plan, and the contents of both lots Nos. 30 and 31 are in the patents taken from the same source—this can readily be tested by measurement according to the scale on which that plan is made. The patents are framed in reference to the plan, the plan in reference to the original survey, and the legislature declares that survey shall govern.

Moreover the large excess said to exist in No. 31 beyond what the plan indicates, and the grant of that lot supposes, arises principally in the west part, and not the east part of such lot.

The patents suppose 70 acres in the east part of No. 30, and 34 acres in the whole of No. 31; but even *Prosser's* line would, he says, give 76 acres to No. 31, of which a very small portion would be on the easterly side of the centre line of the concession, so that the west part of that lot contains nearly 76 acres, and that half or part is certainly bounded on the south by the allowance for road between it and No. 30, and cannot be curtailed by construction or by patent. It is said that *Prosser's* line

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would give to No. 30, 77 acres, and that *Welsh's* line would reduce it to 66 acres, and increase No. 31 to upwards of 80 acres. Compared with *Prosser's* estimate as in evidence the difference would be 11 acres in the comparative contents of No. 30, and only from 5 to 7 in relation to No. 31, and both cannot be correct. It shews, however, that lot No. 31 would not be increased more than 10 or 11 acres by its supposed encroachment upon No. 30, and that No. 30 would not be diminished more than 4 acres below its supposed quantity, as described in the patent. This, I think, affords proof that the east part of No. 30 was intended to be bounded by the allowance for road produced from the west front to the Adjala read, leaving the residue of the tract a broken lot, No. 31.

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I am not satisfied that bounding the east part of No. 30 by that road its contents will not equal 70 acres. If the depth of the half concession be 33 chains 33½ links, as I suppose it is, hearing nothing to the contrary, the oblong square formed by the 14 chains and the centre line of the concession would contain 46 acres or more, and the irregular figure which the residue of the lot would form, would, I think, equal 24 acres, unless there be some inaccuracies in the evidence or plans as I understand them.

Judgment.

Had the south or lower side of the east part of No. 30 corresponded with the south or lower side of the west-half, or been 25 chains from the Adjala road, instead of 14 chains, the north boundary of that lot, and the allowance for road between it and lot No. 31, would still have been the same, and its contents would have been increased in proportion. So No. 31 might have been less, had its southern boundary been nearer the Adjala road than it is. All tends to evince that the contents cannot determine the division line, and if the determination of that line had preceded these grants, it could have been of no consequence to the Crown as owning the

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whole, what the contents of the lots were, or where the allowance for road divided them, provided it connected the 6th and 7th concessions road with the Adjala road. I do not see that No. 31 being set apart as a clergy reserve can make any difference, although it may have been taken in the specification as only 84 acres. Inaccuracies of that kind, since the original survey, cannot change or alter the original survey or the effect thereof under the statutes.

Judgment.

The method suggested of tracing 30 chains upon the centre line of the concession to determine the west boundary and length of the east part of lot No. 30 is a mere alternative, unconnected with the original survey. Among other objections to it, it may be observed that it cannot lead to any allowance for road between 30 and 31, any more than the distance of $35\frac{1}{2}$ chains traced on the Adjala road, unless it be to the allowance left on the west sides of those lots. If that road were opened or traced up to the centre of the concession, the proposed line of 30 chains, if traced up from the south-west angle of the east part of No. 30, on the centre line of the concession, would intersect it, unless the 30 chains fell short of it, and so intersecting it the line should there stop; for no surveyor adopting that method in an original survey would have passed and crossed the allowance for road so as to stop it at the centre of the concession, and adopting a line drawn up the centre of the concession, therefore supports my view, for whenever it met the allowance for road separating the west parts of the lots, that road would be indicated as the proper division between the east parts also. To govern and block up that allowance would be so clearly against the intention of the original survey, and so absurd in itself that no professional surveyor would think of doing it. If the description given of the east part of 30 had been the reverse of what it is, and the first distance had been run from the place of beginning to the centre of the concession (instead of to the Adjala road) and thence up the centre line of

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the concession, 30 chains more or less, to the allowance for road between Nos. 30 and 31, and if the allowance which divides the west parts of those lots be supposed (as it ought to be supposed) traced up to the centre of the concession, the line traced up from the south side of lot No. 30 along the centre of the concession would intersect that allowance for road at right angles, and in the absence of any other allowance for road made on the ground that would indicate the allowance called for, and I consider the description as it is the same in effect as if the allowance had been traced through to the Adjala road.

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Section 40 is not applicable. It is intended to provide for the casualties therein specified—not a case like the present. The lots could not be divided along the Adjala road by the method therein declared, no such survey ever was intended, and that section is meant to supply lost posts or monuments, or to supply incomplete surveys that were intended but omitted to be made. But if applicable, I see no better course to be pursued than what I think the correct one, without regard to it. No place of beginning from which the side lines of 30 and 31 could be run, was ever posted or intended to be marked or left on the Adjala road, and I do not see how it can be run pursuant to the statute except by tracing the allowance for road from the west side of the lots to the Adjala road.

Judgment.

Nor do I think the limits are to be determined by applying the distances specified in the patent of 1838, as if they had been positively expressed, or that there is any more right to adopt the second distance of 35 chains 50 links as positive, unless an allowance for road be actually found, than to stop in the first distance at the end of 10 chains, though short of the Adjala road by 4 chains: or that tracing from the point of intersection with that road at the end of 14 chains, we are to go on 35½ chains, and then stop because no allowance for road

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can be found posted or marked on the ground between the east parts of lots numbers 30 and 31, any more than at a point 1 chain and 50 links from the centre of the concession, or at 5 chains 50 links from such centre, allowing for the 4 chains excess between the place of beginning and the Adjala road. I look upon the patent as if it had said 35 chains 50 links, more or less, to the allowance for road, according to the original survey, field notes, and original plan, and according to the statute in that behalf.

It might have happened that by tracing $35\frac{1}{2}$ chains on the Adjala road the east part of 30 would contain only 20 acres, but that by continuing it to its intersection with the allowance for side road produced from the westerly side or front of the lots, it would amount to 70 acres or 100 acres; or that by so tracing $35\frac{1}{2}$ chains the line would pass such place of intersection, and cover 100 acres or more, how could the distance prove its own accuracy or consistency with the actual survey or allowance for road as originally made. Or it might have happened that the triangular lot No. 31 contained only 20 acres bounded by the three roads, as represented on the government plan, instead of 34, as assumed in the patent, or 76 to 80, or more, as it is said it does, while No. 30, divided from No. 31 by the allowance for road, as therein also laid down, contained its full quantity of 70 acres or less, say 60 or more, say 90, how could the distances in the patent decide that such was not the correct line of road, or where else it really ought to be? No quantity is separately expressed in the patent for No. 31, as the supposed contents of that part of it which is east of the centre line of the concession. According to the plan it would be of small dimensions, without space for an allowance for road beyond the line of road laid down on the plan in continuation of the allowance made on the west side. And this affords another proof that such a road, and no other, was intended. Moreover, in determining the east part of No. 30 by the application

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of the patent of 1838, what right is there to add 7 acres to the quantity mentioned in diminution of the east part of No. 31, or why is not quantity instead of courses and distances to be adopted, all are by the additions of the words "more or less" rendered alike indefinite.

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McLaughlin.

It is obvious, and experience teaches, that the courses, distances, and quantities indicated in the plan and specified in the grants, may all differ from the actual courses, distances, and contents upon the ground, when ascertained according to the statutes; which were passed to obviate and provide against these very inaccuracies.

Treating the east parts or halves of the lots in the 7th concession as constituting a separate concession, there would be nothing on the ground but quantity to indicate any lot No. 31, or that the whole triangle east of the centre of the concession did not form part of lot No. 30, like No. 31 on the west half of the concession, except that the post planted (if any) at the intersection of the west front line with the Adjala road to designate the north-west angle of 31 would shew that no lot 32 was intended. The original plan before the patent, and the patent afterwards shew that it was intended to leave a broken lot No. 31 on the east side of the centre line of the concession as well as on the west. The patent calls for an allowance for road bounding No. 30 on that side, and leaving an east part of No. 31 beyond it, and east of the centre of the concession, and seeing by the plan and patent that the south or lower side of the allowance for such road is supposed to be only 1 chain 50 links from the centre of the concession to the Adjala road, and that the upper side must be still less by reason of the diagonal course of the Adjala road, there could be no object in leaving such an allowance merely to the centre of the concession, unless it united with the allowance dividing the west halves or parts of those lots. It is manifest, therefore, that no such result could have been contemplated as that contended for by the defendant;

Judgment.

1854. and that the object and intention must be disappointed if a continuous road allowance is not established, but that if it be established the intention is fulfilled.

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Nothing actually done upon the ground shews that any part of No. 30 extends beyond the square of 14 chains already suggested, or that any part of 31 lies east of the centre of the concession, if the allowance for road made on the west thereof is not continued. The government plan shews that such allowance was to be continued, and the Crown patent confirms it, for when the patent calls for an allowance for road, what allowance can be intended or meant except the only allowance that indicates any part of lot No. 31 eastward of the centre line of the concession? or that No. 30 was to be extended beyond a width of 14 chains, or was not to include the whole tract east of the centre line.

Judgment. Regarding it as a separate concession, the plan, though it shews a road 1 chain 50 links from the centre line dividing the lots into east and west parts, shews also that the allowance for road on the east side is in continuation of the allowance dividing the west parts or halves, so as to lead from the west front through to the Adjala road, and such allowance should be carried out upon the ground, otherwise the plan would control the survey, not the survey the plan. It may be also suggested that if each half of the concession is to be looked upon as a separate concession, it follows that there can be no jogs or errors, each being in that event entirely independent of the other, and no reference should be made to the west halves or parts of either No. 30 or 31. But this does not appear to me to be a correct view. It is contrary to the fact, for it is only one, not two concessions, and the statutes 10 & 11 Vic., ch. 54, 13 & 14 Vic., ch. 86, and 12 Vic., ch. 35, sec. 37, speak as if they were only to apply when the lands were *granted* or *described* in half lots. There is no doubt or meaning in this in relation to different grantees or proprietors, but

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whether *granted* or *described* in full or half lots, I apprehend the governing posts and side-lines of each half lot, when so laid out, must be adhered to in compliance with the statute.

1854.

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McLaughlin.

In the present case the east part of No. 30 is a separate grant from the west-half, and the tract is described. Lot No. 31 is granted in one lot, and is not described. It is not granted as being in two concessions, or as partly on one side and partly on the other, of the centre of the concession, but simply as lot No. 31 in the 7th concession. Both are imperfect lots, and deficient in the regular quantity of full lots; and the whole of both might have been included in one grant without any further description, (like the grant that was made of No. 31,) but with an allowance for road between them; or No. 31 might have been first granted and described, commencing at the south-west angle or front of the 6th concession, thence along the lower or southern side of the lot, or the allowance for road between 30 and 31 to the Adjala road, and so on to the place of beginning. Or for the first distance running from the place of beginning along the west front or side of the lot to the Adjala road, and thence along the Adjala road to the allowance for road between Nos. 31 and 30, supposed distances, more or less, how, in such events would such allowance be determined?

Judgment.

Had the whole survey of the township been strictly accurate, and the half lots respectively formed separate concessions, the question would be just the same as it is, and should be determined on the same principle. Had the post planted to mark the south-east angle of No. 30 been in a true line with the one planted at the south-west angle or the other front, where it would have been upwards of 20 chains from the Adjala road; or even had it been a point still further removed from that road the question would have been the same, so that the error or jog perceived in comparing the two ends of No. 30 does

1854. not materially affect its solution. That depends upon the tests or data in determining the allowance for road on the upper side of No. 30, and dividing it from another broken lot No. 31, lying beyond it or between it and the Adjala road in that direction.

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v.
McLaughlin.

Judgment.

It may be a very simple process, and a ready way of disposing of the difficulty in this case, to treat the east-half of the 7th concession as a separate concession from the west-half, and to regard the division line or allowance for road between 30 and 31 as not determined or determinable by any original post or actual operation performed upon the ground, in the original survey, and to apply the description contained in the patent of 1838 for the east part of No. 30, which preceded that of No. 31, as indicating the boundaries and contents of that part of No. 30, and to give it its full quantity irrespective of No. 31—which can only be the residue of the tract—and of the allowance for side road made between the west parts of those lots, or not finding an allowance for such a road marked upon the line of the Adjala road, to adopt the distance mentioned in the patent, 35 chains 50 links, as conclusively indicating where it ought to be. The consideration is, whether that be the correct way to proceed, seeing that upon the ground other means exist of date anterior to the patent, by which the matter may be determined in accordance with the spirit and intentions of the statute, and upon a principle not restricted to these two lots, but equally applicable, as any correct decision ought to be, to all the lots and allowances for side roads upon the whole northern line of the township, and in all other townships or concessions, under similar circumstances; and seeing, moreover, that although full half lots ought to contain 100 acres each, and that the whole tract east of the centre line of the concession, and bounded by the southern side of No. 30, would not, either as represented in the original plan or upon the ground, contain 100 acres, and yet the part of No. 30, instead of including the whole, is supposed to be and is described

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as containing only 70 acres, and does not embrace the whole tract, but that an allowance for road is called for as separating it from the east part of No. 31, assumed to have been made in the original survey, and then existing and limiting the boundary. The patent does not for the first time indicate or dedicate an allowance for road, but supposes it to have been made in the original survey.

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McLaughlin.

The patent of 1838 shews that No. 30 was limited to 70 acres, owing to a supposed allowance for road between it and 31. It may be said it likewise shews, as the plan does, that such allowance was assumed to be 30 chains from the intersection of the south-west angle of the east part of 30 with the centre line of the concession, wherefore a full half lot was intended, so far as and on the only side that the ground admitted. This is true, but it equally shews that although 30 chains on that line would not, with the other lines, embrace 100 acres, but 70 only, owing to its being a broken or imperfect lot, yet such was nevertheless to be the limit, for reasons very evident, on reference to the plan, the effect of the Adjala road, and the original survey; and having respect to the allowance for road between 30 and 31 on the west side of the concession.

Judgment.

The merely accidental circumstance of lot No. 30 being a lower number and granted before No. 31, or of No. 31 being a remnant, cannot govern the decision. Both are remnants in reference to the whole lots respectively. The east part of No. 31 is not a remnant of No. 30, but of its own proper number. However expedient or convenient it may be therefore to adopt the patent, and apply it by analogy to the rule of *cy pres*, I do not think it the method that ought to be adopted, unless it is found to correspond with, and to be sanctioned by the original survey, that is, with what the original survey, posts and monuments, and the official measurements in the commissioner of Crown lands' office indicate, and the statute requires to be observed.

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It is not the case of an imperfect or unfinished or obliterated survey—all was done that it was intended to do, and when the post was placed at the north-east angle of No. 30, on the Adjala road, it was not intended either that a line drawn from thence to the centre of the concession should constitute the whole of the east part of that lot; nor was it intended that all the land east of the centre of the concession continued to the Adjala road should constitute one lot, or that 30 chains on the centre line of the concession should define its limit, but it was intended that whatever tract of land was to the east of such centre, should be separated by an allowance for road, which, according to such intention, could have been no other road than the allowance previously made on the westerly front between lots Nos. 30 and 31. The division between them on the Adjala road could not be determined by equally dividing the distance. It does not form the proper front of either lot, and such a rule could not be applied in relation to other lots and concessions bounded by the Adjala road, as it must be if applicable in this instance. The plan and government grants suppose a corresponding survey on the ground accurately posted, and delineated with continuous roads through the concessions, but it is not so—errors or jogs exist. Still I find no authority for the commission of other errors in judicial construction, in subservience to former errors. Whatever is to be accomplished through judicial exposition should be accurately done according to the real intention, not only of the patents, but of the original survey, to which they are subordinate.

Judgment.

This is not in my opinion a case in which there is no alternative but to adopt the distances or quantity supposed in the patent of 1838. All of which are expressed to be "more or less." The first distance of 10 chains calls for the Adjala road, called the allowance for road on the northern boundary of the township as the positive boundary. The second calls for the allowance for road not between the east parts, as something separate from

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the west part, but between lots Nos. 30 and 31, not an allowance, but *the* allowance, as something defined or existing already equally with the Adjala road, and as it really was. The only defined and existing allowance was that made on the west front of the concession, and if so made in order to be carried through to the Adjala road, the patent calls for that road so continued.

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McLaughlin.

I think that such allowance was originally made with that intention, and that the patent manifestly intends that road as the one therein mentioned, and which was to bound the east part of No. 30 on its upper side. I think no other road or limit between these lots was contemplated or intended to be made either originally or in the patent, so that taking the patent by itself, and applying it not fancifully, but according to its obvious and undoubted intention the one road and no other is plainly designated, and called for as the northern limit of the east part of No. 30.

Judgment.

It is not pretended the monuments or posts are lost, or that the allowance for road cannot be traced. The posts that were planted are undisputed, and the allowance can be readily run through.

The patent of 1838 professes to grant only the east part of No. 30, being that part which is east of the centre of the concession, and nothing more, and clearly nothing beyond the allowance for road called for as bounding it on that side which is next to No. 31, any more than beyond the Adjala road, which bounds it on another side.

The allowance for road so called for by the patent is to be first determined from the original survey, and other official sources; not to be ascertained by mere reference to the description contained in the patent. There is only one way to determine it according to the data afforded by the original survey, the plan, field-notes, and the

1864. statute, and when that is done I can see no alternative but to continue the allowance for road from the west front, and that being done the limit between Nos. 30 and 31 is ascertained, and the patent should be applied accordingly. So far as relates to the road allowance in question, it is not a concession surveyed with double fronts. To the extent of the full lots it was so laid out, beyond that it has a single front only.

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McLaughlin*

The plan, &c., shew that No. 31 was intended to be a triangular tract with only one front properly so called in reference to the concession lines; not such a figure as the proposed application of the patent of 1838 for the east part of No. 30 would make it, that is, the west-half or part of No. 31 a four-sided figure, and the east part a triangle, and the whole an irregular figure of five sides instead of three.

Judgment. The shape of the lots, as exhibited in the original plan, their supposed quantities, courses, and distances, and the allowance for road indicated thereby, combine to shew that the original survey intended to make the allowance for road between those lots a continuous one from the west side or front through to the Adjala road. And I am not able to perceive any good reason why the original intention should not in this instance, as in others, be fulfilled, or why it should be frustrated in deference to an erroneous placing of the posts at the south-east angle of No. 30, and the distances mentioned in the patent contrary to what is indicated by the sources from which the description given in the patent was taken, and contrary to what I cannot but regard as the clear meaning and intention of the patent itself. It appears to me not only contrary to the real intent and meaning of the patent, but against the design and intention of the original survey, and of the provisions of the statute by which the boundaries of lots and concessions, &c., are to be governed.

The case of *Badgely v. Bender* (a) appears to me

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strongly in favour of my view of the case, especially as relates to the only legitimate use which I think may and ought to be made of the government plan, or the letters patent. I therefore adhere to the views expressed by me in the court below, and think the present appeal should be dismissed with costs.

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ESTEN, V. C.—The question in this case is one of intention. It is quite certain that the Crown could have granted its land by the patent in question, in any shape or quantity it chose so long as it did not interfere or clash with previous grants. The intention, however, evidenced by this patent cannot be executed in all its parts, because they are inconsistent with each other. Under such circumstances it is the duty of the court to give effect to the whole instrument, and make every part of it speak, as much as possible, and where that is impossible, to sacrifice that which is secondary and unimportant to that which is primary and material. In this case the description first conducts to the Adjala road; then along that road a certain distance more or less to a supposed allowance for road, and to within a certain distance more or less of the centre of the concession; then along that line a certain distance more or less to the south-west angle of the half lot, an undisputed point; then a certain distance more or less to the place of beginning.

Judgment.

This patent, of course, on the face of it presents no ambiguity whatever, but when it is attempted to be carried into effect, the circumstances of the case create much difficulty. It is therefore a case of latent ambiguity, and we are warranted and required to resort to the surrounding circumstances, which have created the difficulty for the purpose of resolving it. The facts which appear as disclosed by the evidence, or admitted by the parties, are that it is not ten chains from the starting point, as represented by the patent, but fourteen chains to the Adjala road; that no allowance for road can be found,

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and that the prescribed distance along the Adjala road of 35 chains and 50 links will not conduct to the required distance from the centre of the concession, and will give more than the prescribed width of 30 chains to the lot. It is therefore impossible to carry this description into effect in all its parts, because they are inconsistent with each other, and the question is, which parts we are to retain, and which to relinquish, or in other words, which parts are primary and material and which subordinate and ancillary. Mutual admission has freed the case from some of the difficulty which would otherwise have attached to it. It is admitted on all sides that the line from the starting point must be extended to the Adjala road, whatever the distance may be; it is also admitted that the prescribed distance from the terminus on the Adjala road to the centre of the concession is unimportant. The points of the description which remain are the distance along the Adjala road, the allowance for road, and the width of the lot. It has been mentioned that an actual allowance for road cannot be discovered. This is much to be regretted. The allowance for road is admitted on all hands to be the cardinal point in the description to which all other parts, where inconsistent with it, are to yield. The learned chief justice of the Common Pleas and Mr. Justice *Richards* obtained this desired limit by means of a prolongation of a side-line in the other part of the concession, and thereby established what is called "Walsh's line," affording the smallest quantity of land to the appellant. This method has certainly convenience to recommend it; but it seems to be generally understood that we can no more resort to the other part of this concession for guidance in this matter, than to a totally different concession. The result is, that we have no allowance for road. Yet I apprehend that it is quite certain that one exists, and that it ought to govern this whole description. Obligated as we are, however, to determine the case in the dark as to the most material fact in it, we have only to decide between the line along the Adjala road and the rear of the lot.

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It is admitted that all the lots in the concession were intended to be of the width prescribed for the lot in question, and that if they are not in fact so, it is unintentional, and the effect of mistake. It is quite certain that the Crown intended the lot in question to be 30 chains wide. There were three cardinal points in this description, one, that the lot should extend to the Adjala road, another, that it should extend to the allowance for road; a third, that it should be of the width of 30 chains. The two first were not to be dispensed with; the third was to yield to them if necessary. But the Crown had no absolute intention with regard to the distance along the Adjala road; it was prescribed because it was thought that it would carry the lot to the allowance for road, and make it of the required width, and for no other reason. If we sacrifice the width of 30 chains to the distance along the Adjala road, we shall make that which was in its nature ancillary and subordinate prevail over that which was primary and material; and that for no other reason than because it occurs first in the description. Upon the same principle, if the surveyor had taken the other course, and had described the rear of the lot before the line on the Adjala road the opposite construction would have prevailed. But the order or sequence of the description appears to me to be merely accidental, and to furnish no indication of intention whatever; the line along the Adjala road is preferred, and made to govern, because it is assumed that the Crown intended to make that line of a certain length in the abstract; whereas nothing is more certain than that it did not intend to make that line of any particular length, but only so long as would make the lot 30 chains wide, provided it extended to the allowance for road. In the event which has happened the description should be read as if it was reversed. The surveyor took the course which he did, because he had no doubt that an allowance for road would be found; had he known that no allowance for road existed or could

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be found he would certainly have taken the opposite course. To reverse the description is not taking too great a liberty, because the order of the description is not essential, and to adhere to it would be to defeat the only part of the intention which we are enabled to execute. This view is strengthened by the fact that the miscalculation of the distance to the Adjala road led to the line along the Adjala road being made longer than it otherwise would have been. I think, therefore, that in the absence of an allowance for road which ought to govern, effect is to be given to the next most material part of the description, namely, the width of the lot, and that the line on the Adjala road ought to terminate at a point which will produce the prescribed width. This construction will, I believe, leave the appellant a trespasser in some degree, and therefore I think the judgment granting a rule for a new trial ought to be affirmed.

Judgment.

BURNS, J.—I have not been able to reduce the difficulties of this case to a mathematical demonstration satisfactory to my own mind, and therefore it is by no means free from doubt that I have formed the opinion I now give, but it is the best I can form under the circumstances of the case.

These difficulties arise not by reason of any disputed facts, because if that were so, an end might be made by saying that one believes such or such another state of facts to be the truth, but these difficulties arise in the application of certain principles, either legal or proper to be applied, as they may strike the minds of different persons. No question can or does exist between the parties as to the application of the statute 12 Vic., ch. 85, to a certain extent. No doubt the plaintiff is right in starting from the ascertained front post between Nos. 80 and 81 on the line between the 6th and 7th concessions, in order to discover what land is comprised within No. 81, and the defendant is right in starting from the

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post between 29 and 30, on the line between the 7th and 8th concessions, in order to ascertain what comprises the east part of No. 30. The township having been surveyed with double fronts to each concession, and these points being indicated by indisputable marks in the original survey upon the ground, places this position beyond dispute. Between lines protracted from these points to the Adjala road, lies the depth of the 7th concession, and consequently these lines are governing limits within the 32nd section of the act. The centre of this concession is not in dispute, and could not be in dispute, for it depends merely upon measurement, and also within the meaning of the 32nd section, combined with the 37th section, is a governing line. There is a road allowance between Nos. 30 and 31, and that allowance is known or marked upon the ground on the front between the 6th and 7th concessions, but is not known or marked upon the ground, and never was intended so to be, on the limit between 30 and 31 upon the Adjala road.

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McLaughlin.

Judgment.

The plaintiff supports his claim to the land in dispute upon the fact of the allowance for road being known on the front between the 6th and 7th concessions, and that in the absence of any proof of a survey upon the ground shewing the posts planted on the Adjala road, which is not to be treated or considered as the front of the half lot 30, he has a right to carry the road straight through from the 6th concession. The difficulty I have in the way of supporting that view of the subject is this: that line considerably passes the centre of the concession, and though the plaintiff's patent grants him No. 31, and of course would give him a right to all the land over the centre, yet according to the statute, that line being one run from a post planted in front on a concession which has been run with double fronts could not pass the centre, and when the centre was reached there, according to the statute, the survey of that line must end. The difficulty here is apparent, on the facts as

1854. the matter stands, when the survey on the ground is looked at. The posts forming the respective fronts of the half lots of No. 30 on the line between 29 and 30 differ 6 chains 59½ links from being opposite each other, and consequently the line of 31 differs the same from what 30 would be if it is to retain its full width on the centre of the concession. If each half lot is to be surveyed from its front post to the centre of the concession, I think it must govern the plaintiff in respect of that line, and he would have no right to cross it in order to determine that front of his lot, and for the land east of the centre he must take some other method. The road of course is dependent upon that line, and would be governed by it till it reached the centre of the concession. The difficulty then arises how is the road to be brought from the Adjala town line to meet this? The government plan shews the road to be straight through, but so it does with every other side line, and side line road. When the ground is examined it is found the survey there conflicts with the representation on the plan, and the distances given in the respondent's patent, which we must suppose followed the field-notes, conflicts with the plan as applied to the actual survey, and the patent itself conflicts with the survey on the ground, because the first distance instead of being 10 chains to the Adjala road is 14 chains. If the plaintiff must take some other method of ascertaining where the road is on the east side of the centre of the concession so as to divide 30 from 31, leaving the allowance between them, then is the defendant's method of survey the correct one?

Judgment.

I feel a difficulty in supporting *Prosser's* survey by applying the statute to it. The defendant's lot is described on the centre of the concession as being of its proper width, and which by applying it to the survey on the ground must carry it further north than the plaintiff's southern boundary by six chains, fifty-nine and a-half links. If this line could be taken as the

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correct boundary as surveyed from south to north, I should feel no difficulty in saying that when the surveyor came to the road allowance he could cross it, because if it be imperative under the statute to survey from each end of the lot to the governing point and line in the rear, then if the roads did not meet, it is a difficulty made by the law, and we have nothing to do with that. It would be so with the other lines as shewn, and I do not see any reason why we should apply a different rule, because the plaintiff's lot happens to be a triangle, and the defendant's lot one with five sides, than would be applied where the lots and half lots are rectangular. As observed before, the defendant's starting point however is correct, and the statute governs it. From this point to the Adjala road causes no difficulty, but it is at the Adjala road the difficulty arises in the application of the statute. The western boundary of the township does not form the front of the concession, and no posts being planted along this line and never intended to be, it is not a case for measurements and dividing of distances according to the act. The provisions of the act are inapplicable to complete the remainder of the survey of the defendant's lot.

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Judgment.

According to my view both appellant and respondent must be bound by the operation of the statute so far as it is and can be applied, but that it does not help either of them out of the difficulty presented here. In that predicament, then, should we resort to the plan in the government office? I look upon the plan and field notes as subservient to ascertain what the survey upon the ground was, and wherever that can be ascertained it must govern. Here the plan is not adduced for the purpose of ascertaining what the work on the ground was. We know what it was. It has been proved, and it is not consistent with the plan. It is true no work upon the ground shewed that a post was upon the Adjala road, but all the work on the ground shewing the lines of thirty to thirty-one to the south, and the

1864. field notes describing the distances, (for I think it fair to assume the patent taken from that until the contrary be shewn,) prove that the work on the ground does not correspond with the plan.

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McLaughlin.

Judgment.

Then we have a case in which a survey cannot be made for either plaintiff or defendant according to the terms and provisions of the act of parliament: a case in which the actual work upon the ground conflicts with the plans. The field notes, taking the description in the defendant's patent to correspond with them, when applied upon the ground (which of course they must be when the monuments are there still in order to test them) do not correspond with the plan, but differ from it also. The road reserved was a public highway, and I have no doubt must be considered so, although the Crown had never granted No. 30 and 31, and persons obstructing it would be liable to be indicted. But then as in the present case, it would require to be established by law where the road was, and precisely the same difficulty would arise from the work on the ground, the plan, and the field notes returned by the surveyor who originally surveyed the township. It is not the road which governs the boundaries of the lots, and the statute has not made the road the governing boundary, but the allowance being between the two lots the boundaries of the lots must be ascertained, and, when ascertained, that determines the road. If the statute had made roads the boundary for lots, there might not then have been so much difficulty in carrying the road straight across the centre of the concession to the Adjala road, as the plaintiff contends it should. The lots must be ascertained, and the half lots where the survey has been with double fronts must also be ascertained before it can be determined where the road is or should be. Under these circumstances I see no alternative than to give effect to the defendant's patent according to the courses and distances therein contained, and to say that such quantity of land as is not contained

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therein up to the Adjala road, making the due allowance for the side line road, belongs to lot No. 31. I only mean this to the extent when the statute cannot be applied, for where that can be it must govern. *Prosser's* survey was made according to the distances mentioned in the patent, and as the statute cannot govern him, I think this decides where the road is. No doubt this result was never intended, but it is the consequence of the act of parliament, which is as restrictive in my opinion on the plaintiff, and prevents him from continuing the southern limit of No. 31 through from the 6th concession to the Adjala line, as it is inoperative to give both plaintiff and defendant the means of determining the respective boundaries beyond the posts and limits I have already mentioned.

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SPRAGGE, V. C.—The description contained in the Crown patent cannot be literally followed out upon the ground; but taking the description as it is, and comparing it with the position of the township of Albion in which the land is situated, as that part of the township actually lies, I have endeavoured to discover what piece of land is comprised in that description, taking it as a question of intention, the intention to be gathered from every course and distance which the description contains.

Judgment.

The description appears to me to evidence with sufficient clearness the intention as to two courses and distances; being the only two which are not affected by the irregularity caused by the Adjala road running diagonally across the upper portion of the lot; and these two, judging from the maps, appear to agree both in bearings and distances with the corresponding sides of the other half lots in the same concession. One of these lines is the line from the front of the half lot to the centre of the concession; the other is the width of the half lot in the centre of the concession.

The whole difficulty has arisen from the description

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assuming the south easterly angle of the half lot to be 10 chains, instead of 14 chains, as it is, from the Adjala road; that erroneous assumption is the basis of the distance given in the the second course in the description, namely, 35 chains 50 links more or less to the allowance for road between lots 30 and 31. I agree that if any original monument marking such allowance for road had been discovered, whether at a greater or less distance than that given, it would have governed; but in the absence of that we are thrown back upon gathering the intention from the whole description. I think it is clear that this second distance is based upon the error in the first, because drawing a line from the front reached by that distance, parallel with the side line of the lot, to the centre of the concession, then taking a course down the centre of the concession to a point which is the admitted south-west angle of the half lot, it will give us the breadth of the half lot about the same excess as exists in the first *actual* distance, i. e., from the starting point at the south-east angle to the Adjala road, over the *described* distance, thus, if the first distance be 10 chains the third will be 30; the first being in fact 14, the third is thereby made 34, if the distance along the Adjala road be implicitly followed. I think it is manifest, therefore, that the first error is the parent of the second.

Judgment.

The enquiry naturally suggests itself, to what extent was it intended to run along the Adjala road, and why was 35 chains 50 links named as the distance. I cannot avoid the conclusion that the sole purpose was to reach a point from which a line drawn to the centre of the concession parallel with the side line would be 30 chains from the south west angle of the half lot, or, in other words, to give a lot of the ordinary width; which purpose would have been accomplished if the south-east angle had been, as it was supposed to be, 10 chains from the Adjala road. The distance along the course of the Adjala road required for that purpose was a matter of

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mathematical calculation, (not a measurement to reach any known point,) and would have been correct if the basis upon which it was made had been correct.

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McLaughlin.

With the facts before me, I cannot doubt that if the first distance had been known to be 14 chains instead of 10, the distance along the Adjala road would have been proportionately shortened, and not doubting this, I could not give effect to the distance along the Adjala road as governing distance, without feeling that I was defeating the intention of the grantor, as gathered from the whole description compared with the first distance on the ground.

I have endeavoured to test this intention by taking a diagram of the ground with the true distances, and applying to it the description in the patent, but reversing the order in which the different courses are taken. I may be wrong in supposing that this can properly be done, but it seems to me to be immaterial which course be first taken, so as all are taken correctly; and I should have thought that taking indisputable distances as the basis of the description would have better ensured a correct result.

Judgment.

Preserving then the same bearings and distances, and the same starting point; to run first to the centre of the concession, thence northerly along the centre of the concession, then parallel with the first line to the Adjala road, then along the Adjala road to where it intersects the concession line, then along the concession line to the place of beginning. Such a description would be strictly correct except as to the distance along the Adjala road, and from that to the starting point—that along the Adjala road would be plainly immaterial and would be discarded as secondary and of no real importance; and in the description in the patent, although prior in point of time to the distance along the centre of the concession, it does appear to me to be

1854, secondary to that course and distance, to be a consequence of it, and to be regulated by it, and to have been stated at first what it is only because the centre line was thirty chains long; and for no other reason whatever.

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McLaughlin.*

The objections to producing the division line between lots No. 30 and 31 from the western point through the easterly half lots appear to me to be unanswerable. The statute of 1849 provides in effect that in townships with double fronts the easterly and westerly half lots shall be independent of each other. To produce this line would be to contravene the principle by which the whole survey of the township is governed, merely because in one lot of a township there may happen to be no easterly front. This point has been fully commented upon by his lordship the Chief Justice, with whose remarks upon the subject I entirely agree. Upon the general question, however, I can come to no other conclusion than that which I have expressed.

Judgment.

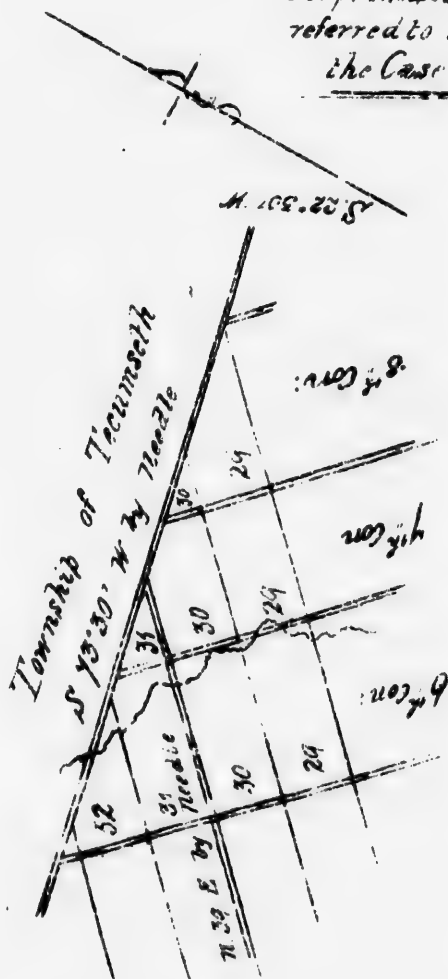
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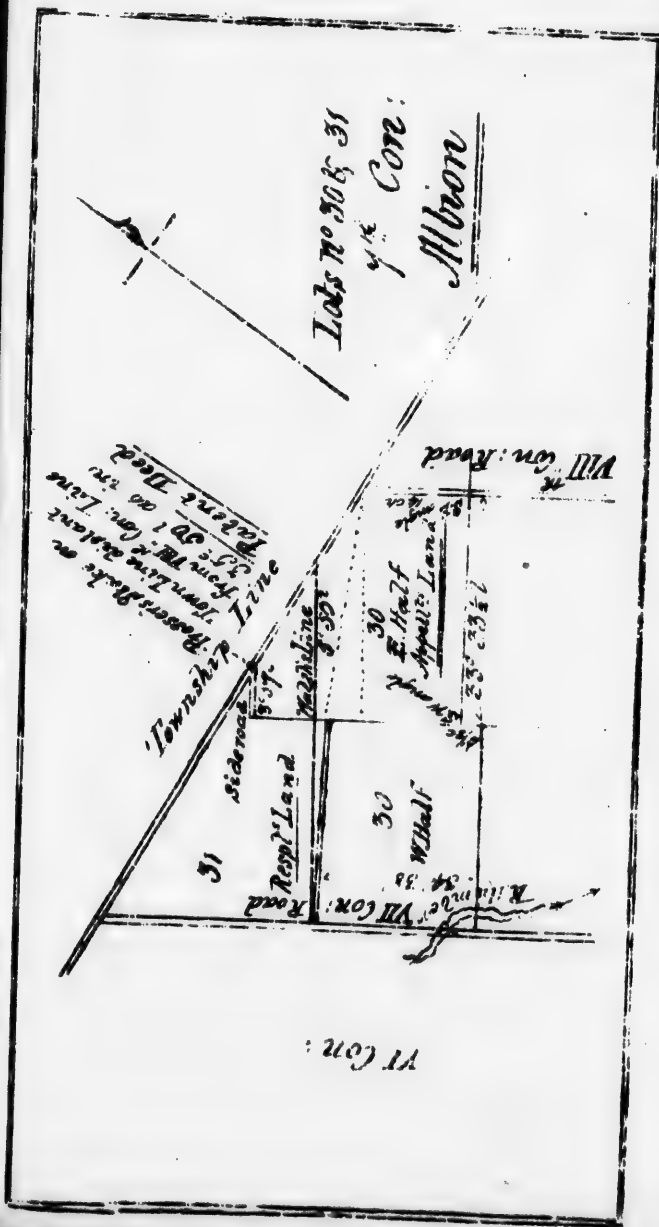
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[Before the Hon. Sir J. B. Robinson, Bart., Chief Justice of Upper Canada, the Hon. W. H. Draper, C. B., Chief Justice of the Common Pleas, the Hon. V. C. Esten, the Hon. Mr. Justice Burns, the Hon. V. C. Spragge, The Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]

ON AN APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH.

MOUNTJOY V. THE QUEEN.

Grant from the Crown—Highway.

On the 8th of January, 1836, a surveyor, in compliance with instructions from the government agent, laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then, and had for some time been, in the actual possession of the Episcopal Church, to which body a patent subsequently, and on the 18th of January, 1836, was issued, granting to them all that parcel or tract of land, "on which the Episcopal Church now stands, and containing four acres and two-tenths of an acre or thereabouts," upon an indictment for a nuisance in stopping up the highway.

Held, that this survey, although made after the grantees had gone into possession, must prevail against such possession.

[Hagarty, J., dissenting.]

THE appellant *John Mountjoy* was indicted for a nuisance for unlawfully and injuriously erecting a certain fence of the length of two hundred feet, and of the height of four feet, in a certain street in the city of London, called East North Street, being the Queen's common highway, whereby the same was and is straightened, narrowed and obstructed to the great damage of all Her Majesty's liege subjects, &c.

Statement.

To this indictment the defendant pleaded "not guilty," and was tried before the Hon. Mr. Justice Richards in the month of March, 1860, when the jury returned a verdict of guilty. The effect of the evidence taken upon the trial is stated in the judgment.

A rule *nisi* for a new trial was subsequently obtained

1861. which upon argument was discharged. His lordship the Chief Justice [Robinson] in disposing of the case saying :
 Mountjoy v. The Queen. "The report of the case of the *Queen v. the Bishop of Huron*, (a) will explain the nature of the question presented by this case, which turns upon the same patent, and the same facts, though the evidence upon the two trials in some respects varies.

"The defendant in this case is an occupant of part of the land, which it is contended on the part of the prosecution is not included within the patent referred to in the case in the Common Pleas, and he has inclosed all the land up to the northern limit of East North Street, assuming that street to be 100 feet wide only, and not two chains, or 132 feet.

"The letters patent by which the Crown granted certain lands in and near the town of London, as an endowment for the Rectory of St. Paul's Church, in the said town, describes the land thus, of which the defendant is in possession of a part, 'all that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two-tenths, or thereabouts.' It is dated the 18th of January, 1836.

"The question is, whether the description in the patent of the land granted by it did or did not cover the ground on which the defendant has his fence, which is complained of as being upon a public highway. The trial of the former indictment against another defendant, bringing up precisely the same question in effect, took place before myself; and though I reserved the case for the opinion of the Court of Common Pleas, I had formed, I confess, a strong opinion of my own, that upon the evidence given at the trial the land in question formed a part of the land granted by this patent, and was not within the allowance for a street or public highway.

"The Court of Common Pleas have decided otherwise, but not without a difference of opinion.

"We have read the evidence given upon this trial, and see nothing in it to warrant us in holding that if a conviction was proper in the former case, the same verdict

was not also proper upon the evidence that was given in the case now before us. Whether the evidence given upon the trial of this latter case does not better support a verdict in support of the prosecution than the evidence that was given on the former case, it is not necessary to determine, for we think our right course will be to defer to the judgment given in the Court of Common Pleas, rather than to decide in opposition to it; and in this case there can be no difficulty in the defendant obtaining the judgment of the Court of Appeal. We give judgment, therefore, discharging the rule *nisi* for a new trial, and we do so entirely on the authority of the judgment given in the Court of Common Pleas, and in the hope that the judgment may be reviewed on appeal, for the case is one of consequence, upon which I may say that there is among the judges a considerable difference of opinion, and the judgment of the higher court could not be obtained by our taking any other course than affirming the conviction."

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From this decision the defendant appealed, assigning as a reason:

Statement.

That upon the proper construction of the patent, taken in connexion with the evidence given, it should be held to embrace the land upon which the fence complained of in the indictment was erected; and that the learned judge should have so directed the jury.

Mr. *J. Wilson*, Q. C., and Mr. *C. Robinson*, for the appellant.

Mr. *R. A. Harrison*, for the Crown.

The question involved in this appeal was simply whether the line as ran by Mr. *Carroll*, the surveyor, or the fence enclosing the block on which the Episcopal Church stood should govern; the appellant contending that the line of fence should be the boundary, and that the learned judge should have so charged the jury; that not having so charged there had been such a misdirection as would entitle the appellant to a new trial.

1861. SIR J. B. ROBINSON, Bart, C. J.—This appeal brings up the question whether the patent dated the 18th day of January, 1836, setting apart for the use of the Church of England the tract of land in the city of London, on which the church then stood, makes the fence which then enclosed the tract the southern boundary, which would leave 100 feet and 20 more for the breadth of North Street East, or whether in consequence of the government surveyor, Mr. *Carroll*, having before the issue of the patent run a line and marked it through the inclosed tract, intending it to shew the northern boundary of North Street East, the line so run must govern. In the latter case the fence which was put up before the making of the patent and which is still maintained encroaches upon the street to the extent of 32 feet in depth, and to that extent closes up and obstructs the highway.

Judgment. This same point had been before discussed in a prosecution for nuisance against another defendant, which case is reported, (a) and to which reference was made in the judgment given below in disposing of the case now before us. In that case, which was tried before myself, it was sworn by the surveyor who made the original survey of the new addition to the town plot of London on which the church referred to stands, that he had not run out and marked any line to define the northern limits of North Street East until some time in February, 1836, which was after the issuing of the patent.

If that were so, then the mention made in the patent of the "ground on which the church then stood" could not, I think, be held to have any reference to the line of the street which had not at that time been run out, and for that reason, and upon the other evidence given, I should have thought it clear that by the "ground on which the church stood" we ought to understand the tract as actually inclosed and held with the church at

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the time the grant was made. And I should have so held, if it had been left to me to determine the legal question, but both parties desired that the point should be reserved for the consideration of the court from which the record came, and I did accordingly reserve it.

1861.

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The Queen.

It was afterwards discovered, as it seems, that the surveyor was mistaken in supposing that he had not run out and staked the north line of East North Street until after the completion of the patent; and upon the trial of the indictment, which is before us, against this defendant, *Mountjoy*, the surveyor, swore that he had posted North Street, on the 8th of January, 1836, which was ten days *before the patent is dated*.

This is a very material variation from his former testimony, occasioned, I suppose, from his having in the meantime referred to his field notes. And the question now is what, with the knowledge of this fact before us, we must take to be the southern limit of the land granted by the patent of the 18th of January, 1836, in other words, did the Crown grant, and could the Crown grant, by that patent the land that was inclosed with the church and upon which, in that sense, the church then stood; or was and is the tract granted, necessarily confined on the south to the northern limit of North Street as laid out in the original survey of the new town plot that had been made a few days before?

Judgment.

That survey it is proved had not been returned by the surveyor to the government till the 28th of March following the issuing of the patent, and it is not therefore reasonable to suppose that the government referred to any tract as laid out in that survey, when they used the words "all that parcel or tract of land being part of the town plot of London, on which the Episcopal Church of England now stands." It not then what were they referring to? Not surely to the small space on which literally the church stood, that is, not merely to the land

1861. covered by the building, because the tract is described in the patent as containing four acres and two-tenths or thereabouts.

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The Queen.

- I confess I have a strong conviction that as the government from the words used in the patent, evidently were aware that there was this church standing upon a certain tract in the town of London, which tract could be seen and was notoriously marked by the fence which inclosed it and had inclosed it for a year or more, they meant to grant the tract so inclosed on which the church stood, and not a tract as bounded by a line drawn by their surveyor, of which line they had then no knowledge, nor until more than two months afterwards. What I mean is that they most probably intended to make the grant conform to the plan which had been made out and submitted by Mr. *Astin*, and which the rector and congregation had been given to understand had been acceded to.

Judgment

This plan gave to North Street a width of 100 feet, which was 82 feet more than the width of the streets in the plot before laid out, and more I suppose than either the government or the inhabitants of London would have expected to be the width of the streets, if there had been no such special instruction as was given to the surveyor by *Colonel Talbot*.

If the church had happened to be placed upon the very southern limit of the tract as inclosed, on the understanding that the patent had reference to the tract which had been asked for, and which they had reason to believe they had obtained, it would have been difficult I think to contend that the land covered by the church was not conveyed by the patent under the words used. The only question then, I think, would have been whether the government could legally grant the land so covered by the church, notwithstanding it was within the street as it had, before the completion of the patent, been laid out in the original survey of the town plot.

That question under any view of the evidence we are under the necessity of considering, for I understand it to be an undisputed fact, that the street had been laid out on the ground two chains wide before the patent was made.

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The law existing on that point at the time the patent issued in 1836, was the provision contained in the statute, 50 Geo. III., chapter 1, section 12, which enacted that all allowances for roads in any town or township laid out by the King's surveyors shall be deemed common and public highways until such roads shall be altered according to the provisions of that statute, which could only be by the justices in quarter sessions.

This road or street laid out by the surveyor on the 8th of January, 1836, according to the evidence given in this cause was not altered in that manner, and therefore we cannot hold, I think, that it was less a highway after the patent of the 18th of January than before. Whatever title to the soil of the street as laid out that patent could convey would be subject to the right of the public to use it as a highway. So I think the verdict must stand upon the account which we have of the facts.

Judgment.

I think also that Mr. *Justice Richards* was right in leaving it to the jury as a mixed question of law and fact, which it was under the evidence, whether the patent was or was not framed with reference to the tract inclosed by the fence, for that cannot be said to be plain on the face of the patent, and I think we should not disturb the verdict, and that no good would probably arise from doing so, though it seems to me to be a matter for regret that the event of the last trial should have brought the matter to this issue, for certainly 100 feet is in all reason sufficient width for the street, and after an acquiescence of so many years it is hard I think to disturb the boundary of the tract, especially if the alteration will be in-

1861. jurious or inconvenient in regard to any use that has been made of the land in the meantime.

Mounjoy

The Queen.

DRAPER, C. J.—The whole question is, what land is granted by the letters patent of the 18th January, 1836, by the words, "all that parcel or tract of land being part of the town plot of London on which the Episcopal Church of England now stands, and containing $4\frac{2}{10}$ acres, or thereabouts."

This parcel of land was not part of the first survey of the town of London, which extended no farther than to the south side of North Street. There is no evidence that the north side of North Street was then marked on the ground, though the grantee of any lot on the south side had the assurance of a street immediately north of such lot, which according to the plan adopted for other streets would not be less than one chain wide.

Judgment. In the latter part of 1835, the government ordered an additional survey, increasing the area of the town, and including the land in question. Mr. Carroll was employed by the Surveyor-General to make this survey, under such instructions as Colonel Talbot might give him, and Colonel Talbot directed him to lay out the new portion of the town in accordance with the part already surveyed, only making the streets two chains wide. Mr. Carroll acted on the instructions, commencing his survey on the 7th December, 1835. On the 8th of January, 1836, he posted East North Street, east of Wellington Street, and extended the centre of the streets around the church block, and finished posting those streets. "On the 18th January, 1836, he finished posting Church Street and Mark Lane." Mark Lane was only one chain wide, the other streets were two chains wide. This survey with plan, &c., was returned to the Surveyor-General's office on or about the 28th March, 1836, and according thereto this block actually contains $4\frac{2}{10}$ acres, and if the defendant be right, it would contain $\frac{1}{2}$ of an acre more. Mr. Carroll never had any other instructions, and his plan has ever

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London.

Monatley
v.
The Queen.

The defendant maintained the fence charged as a nuisance, which fence stood within 100 feet of the south side of East North Street. For the Crown, it was contended that the fence obstructed the public highway, inasmuch as Mr. *Carroll* had laid out the street in that place, 2 chains (132 feet) wide; that his survey was adopted by the Crown, and that the Crown had done nothing directly or indirectly which deviated from that survey, or limited the width of the street to 100 feet.

On the defence *Colonel Askin* produced a map furnished to him by the government, long before the last survey, of the original town plot of London. He stated that the streets therein were only 66 feet wide; that in the spring of 1833 *Sir John Colborne*, then Lieutenant-Governor of Upper Canada, visited London, and *Colonel Askin*, with the intention of obtaining a new site for a church and burial ground, accompanied his Excellency to the place now in question, "which was then unsurveyed," and his Excellency replied to his application, "Send me down your plan, make an application for it, and it shall be granted as far as I have any influence." Shortly afterwards *Colonel Askin* drew a plan, of which he produced at the trial a copy as near as he could recollect, making the streets all round the block 100 feet wide. A petition was drawn up and was forwarded with this plan to the government, applying for the land shewn on the plan. This plan or sketch, (it was not the result of any survey of the ground,) covered land not now claimed to be granted by the patent, for it included Duke Street, since opened, and also part of a block now belonging to the Roman Catholic Church. It made Mark Lane 100 feet wide, though the fence afterwards erected left only 66 feet for Mark Lane, and it covered considerably more land than is specified in the patent.

Judgment.

The *Bishop of Huron* also proved that the sketch

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v.
The Queen.

prepared by *Colonel Askin* was forwarded with the memorial, and that he had since made every possible search for both, but without success, and that the plan never was returned. That in the fall of 1833 he saw a copy of an order in council directing the land to be granted as prayed for; that after getting this copy they began to build the church, which was raised in the spring of 1834, and was opened that season, and the fence was put up immediately after finishing that church, and was completed early in 1835. That a fence of rails was put up on the north boundary, but was afterwards removed to the south, to the line as laid down there by Mr. *Carroll*. The *Bishop* further stated that he went to Toronto, just before *Sir John Colborne's* departure, in reference to obtaining the patents for two rectories; that there was some blunder; that "things were done in a hurry," that he went to the Surveyor-General's office, "and the clerk then said *they had no plan* and were quite at a loss as to the block." The clerk had the *old plan*, and he measured some of the blocks upon it, and said this block would at all events contain as much as those, and he gave that description which was put into the patent. The *Bishop* explained that the order in council referred to in the margin of the patent was the one *establishing the rectories*.

Judgment.

L. Lawrason, Esq., stated that he remembered seeing the order in council; (*Qu.*, the copy;) that being churchwarden at the time he might have received it, and if so, it was probably burnt in the old church or at his own place. That he had applied at the government office and could not find it, and was informed it had been mislaid or lost; that he could find no entry in any of the books or records in relation to it before the patent.

The learned judge directed the jury that if there was a part of the town plot of London on which the episcopal church then stood, which was known and recognised as a part of the town plot of London, independent

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of *Carroll's* survey, that fact would be evidence for them that the patent was intended to grant such part; or if the grant was made in relation to a fence then standing, in either case they should acquit the defendant. But if the grant was made to cover the part of the town plot then being laid out, *i. e.*, the block of land surveyed by Mr. *Carroll* as the church block, which survey, as regarded that block, was then completed, they should find him guilty, and he stated that in his opinion the plan made by Mr. *Carroll* should govern, but he left it to them. They found the defendant guilty.

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The Queen.

A new trial was moved for on the law and evidence and for misdirection, because the learned judge ought to have ruled as a question of law, that *Carroll's* survey should not govern, and that the patent should be held to embrace the land then known as the church block.

The Court of Queen's Bench discharged the rule, entirely on the authority of the decision of the Court of Common Pleas, in *Regina v. The Bishop of Huron*, the learned Chief Justice stating that there was among the judges a considerable difference of opinion. The appeal is against that decision, and the only reason of appeal assigned is, that upon the proper construction of the patent taken in connexion with the evidence given, it should be held to embrace the land upon which the fence complained of in the indictment was erected, and that the learned judge should so have directed the jury. It does not appear that this objection was made at the trial, or that the learned judge was asked to give such a direction. In fact he only expressed an opinion, as I read his charge, on the weight of the evidence, leaving it wholly open to the jury.

Judgment.

The defence rests, as I understand it, on the influence proper to be allowed to external circumstances, affecting the construction of the letters patent, for without the aid of such circumstances it has not been argued that the defence can succeed.

1861. When the case of *The Queen v. The Bishop of Huron* was before the Court of Common Pleas, I took every possible pains to ascertain what were the facts, so far as any record could be found of them in the public offices, connected with the issuing of the patent. Whatever my anticipations might have been, I found nothing to strengthen the defence, and on the facts proved in that case I thought and still think the conviction right. I felt the doubt which embarrassed my brother *Hagarty*, whether the patent did identify the land intended to be appropriated, and whether, therefore, it was not void for uncertainty.

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Judgment. The general rule applicable to the construction of grants from the Crown, is that they shall be construed most favourably for the king. Though where the grant is *ex speciali gratiâ, certâ scientiâ et mero motu*, the construction and leaning are to be in favour of the subject, (a.) And if the grant be capable of two constructions, by the one of which it will be valid, and by the other void, it shall receive that interpretation which will give it effect. "For the king's honour and for the benefit of the subject, such construction shall be made, that the king's charter shall take effect, for it was not the king's intent to make a void grant, (b) and in *Sir J. Molyn's* case (c) it is said: "Note the gravity of the ancient sages of the law to construe the king's grant beneficially for his honour and the relief of the subject, and not to make any strict or literal construction in subversion of such grants."

Looking no farther than the language of the patent there is no difficulty. It arises in applying it to the subject matter, to the ascertaining the thing granted. The rule *id certum est quod certum reddi potest* applies in the case of the Crown, and if the grant has relation

(a) Com. Dig. Grant, G. 12. Bac. Abr. Prærog. F 2. Vin. Abr. Prærog. Ec. 3.

(b) St. Saviour's case, 10 Co. 676. (c) 6 Co. 6.

to that which is certain, even though it be but mere matter of fact, or *in pais*, it is sufficient. (Com. Dig. Grant G. 5. Vin. Ab. Prærog. R.) 1861.

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We may without hesitation interpret the words, that "tract of land being part of the town plot of London on which the Episcopal Church of England now stands," to mean the land on which the church was standing used for divine worship according to the rights of the Church of England, and then one certainty is obtained, and I agree fully with those who contend that something more was meant than the actual ground covered by the fabric itself, the quantity expressed in the patent, $4\frac{2}{3}$ acres, is enough to establish that conclusion; and in the quantity expressed we have a second certainty, for I treat the words "or thereabouts," as equivalent to the common phrase "more or less." But I wholly disclaim attaching any importance, in the construction of the patent, to the conversation held by *Colonel Askin* Judgment. with the *Lieutenant-Governor*. For the purpose of generally identifying the locality of the proposed site, it is (assuming it to be evidence at all, on which it is not necessary to express an opinion) really of no value, for we need not seek outside the patent for that purpose, as the land to be granted was that on which the church actually stood at that time, though such a description would not have been applicable when his Excellency visited the proposed site. Then the suggestion itself, "send down your plan, &c.," amounts to no more than the expression of a wish that the application might be put into a definite shape, and a readiness to give it the most favourable reception. But it conveyed no authority to survey or mark out and appropriate any particular piece of land, nor did *Colonel Askin* so understand it, for he made no survey, but merely a sketch to accompany a petition for a certain site for a church and burial ground. As to any order in council for the grant of the land as pointed out by the sketch, I am compelled to say, I think there is no legal evidence that it ever

1861. existed, and the evidence tends in my humble judgment to negative its existence. With the utmost confidence in the integrity and good faith of the witnesses who speak of having seen a copy of it, I think they are under some mistake, and if such order is material to the defence it is not proved. All the evidence refers to a copy, for though Mr. *Lawrason* speaks of "the order in council," he is evidently referring to the same paper of which the *Bishop of Huron* had just before spoken, as the copy, and he says immediately afterwards, that he had applied at the government office for the original, and could not find any entry in any of the books or records in relation to it. So far there is no proof of the existence of an original of the supposed copy. And if there had been any such order we might reasonably expect to find it referred to on the face of the patent as the authority for the grant, whereas there is a reference to a different order as the authority,

Judgment. viz., an order of the 15th January, 1836. The lapse of more than twenty years may well account for an error of recollection as to the nature of the document which no witness speaks of having seen since the date of the patent. And the well known reputation of the then clerk of the executive council (Mr. *Beikie*) for scrupulous exactness in the business of his office, renders it next to impossible that he should have issued a copy of an order in council for a grant of land, of which order no trace can be found in any of the books or records of the period. That no such order reached the Surveyor-General's office is pretty clearly established by the *Bishop's* evidence, who went there and saw in what manner the clerk framed the description, in ignorance, apparently, of *Colonel Askin's* sketch, and of the memorial which accompanied it. Indeed if things had not "been done in a hurry," it is not improbable that the framing the description for patent would have been delayed until Mr. *Carroll* who was then making the survey had been referred to, or until his plan, report and field notes had been regularly returned. The pressing haste

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to get the patent completed affords no argument against the Crown, if it has not a contrary tendency.

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It appears that in fact, on the very day the patent is dated and recorded, this block of land was surveyed, and its boundaries were marked on the ground by Mr. *Carroll*. If the grant had in express terms referred to the survey then in progress for the limits of the block, such reference would have prevailed, as affording evidence of the intention of the Crown in making the grant, and would, at least so I apprehend, have been sufficient to define what was granted, or to prevent the grant being held void for uncertainty. Or if Mr. *Carroll's* plan had been returned to the office before the patent was issued, and then the grant had been made in the terms used, there could have been no doubt that the plan could have been referred to in aid or construction of the grant so as to support its validity. It seems to me, that the fact of the block being actually designated on the ground by an officer employed by the government for the purpose of making the survey of which that formed part, may also be referred to as evidence of a third certainty from which the intention of the grant may be ascertained.

Judgment.

It has been objected to this, that the fact was unknown to the Crown when the letters patent issued. That certainly is so, but the objection does not lie in favour of those who set up the fact of the fence then standing on the ground, as evidence that the Crown intended to grant the land so fenced in and occupied by or for the church. For there is no proof whatever, that the Crown or any of its officers were aware that the lot was fenced any more than they were, that Mr. *Carroll* had marked the boundaries; while the fencing was a mere private act, the survey was an official one, and these parties claiming under the patent have never pretended that the patent covered the land as fenced in at the date, any more than that it covered the land represented by *Colonel Askin's* sketch. As to the former, the fence

1861. was removed from north to south to make it correspond with *Carroll's* line, and as to the latter, among other changes, Mark Lane, instead of being 100 feet wide, was laid out by Mr. *Carroll* sixty-six feet wide, and the fence on that side corresponds therewith. Moreover, the fences were not begun until after the receipt of this (supposed) copy of an order in council, and could not therefore have influenced the government in framing such order, if it ever existed.

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Judgment.

So far as any objection to the validity of the patent on the ground of uncertainty is concerned, I think I am justified in upholding it, on the facts, that the site was fixed by the existence of the church thereon; that the estimated quantity of land corresponds with the actual quantity; and that the limits were marked on the ground by competent authority. I might add, but that is not distinctly proved, that *Carroll's* survey has ever since its return been recognised and acted upon by the government. Even if the objection of uncertainty were to prevail, I do not see that it would entitle the defendant to a new trial, for establishing that the Crown have made no grant, would not establish that the *locus in quo* is not a highway. And if it be admitted that *Carroll's* instructions directed him to make North Street two chains wide, and that he did so mark it out, then the defendant is maintaining a fence which encloses 32 feet of North Street, and is guilty of the nuisance charged.

HAGARTY, J., retained the opinion expressed by him in the case referred to in the Common Pleas.

Per Curiam.—Appeal dismissed with costs.
[Hagarty, J., dissenting.]

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[Before the Hon. Sir J. B. Robinson, Bart., C. J., the Hon. W. H. Blake, Chancellor, the Hon. W. H. Draper, C. J., C. P., the Hon. Mr. Justice McLean, the Hon. V. O. Esten, the Hon. Mr. Justice Burns, the Hon. V. C. Spragge, and the Hon. Mr. Justice Richards.]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

COLEMAN V. McDERMOTT.

Free on board—Delivery of goods—Practice—Costs—Time of the essence of the contract.

A party agreed to sell and deliver "F. O. B.," 4000 barrels of flour by a day named; of this quantity 3000 had been delivered, but the remaining 1000 barrels were not in the possession of the contracting party to be delivered until after the day appointed. Some days afterwards the vendors sent to the broker who had negotiated the sale the order of another person for the required quantity, which, after taking some days to correspond with their vendees, the purchasers agreed to accept and paid the price agreed upon to the broker, who remitted the money to the vendors, and a vessel was without delay despatched by the purchasers to receive the flour on board: before reaching the port where the flour was to be shipped on board a fire had taken place in the warehouse and destroyed the flour stored therein. In the absence of any evidence shewing a setting apart of the 1000 barrels of flour by the vendors to answer their contract with the purchasers, and that the delivery order referred to such specific 1000 barrels, or any acceptance by the purchasers thereof, the court, while expressing a clear opinion that under such circumstances the loss must fall upon the vendors, dismissed an appeal from the court below granting a new trial on the application of the vendors, against whom a verdict had been rendered for the price of the flour; the court below having ordered such new trial upon the assumption that a certain fact material to the consideration of the point in question was as stated, in which case the verdict would have been wrong, or that such fact was asserted on one side, and denied on the other, and the same had not been found one way or the other by the jury: reserving for future consideration the costs of the appeal, thus leaving the new trial to proceed on the terms in which it was ordered.

The effect and meaning of the words, "Free on board," considered.

In contracts for the sale and delivery of flour at a future day, and in like cases, time is strictly of the essence of the contract.

This was an appeal from a judgment of the Court of Common Pleas, reported at page 303 of the fifth volume of the reports of that court.

From the judgment there given the plaintiffs appealed, and a statement of the case shewing the reasons for and

1856. against such appeal was settled and signed by the counsel on both sides, as follows:

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The action in the court below was brought to recover the sum of £2186 1s. 9d., as and for the price of 1000 barrels of flour bought by the plaintiffs from the defendants, and, as the plaintiffs allege, not delivered to or received by them, and damage for the non-delivery thereof.

The trial took place at the Toronto autumn assizes for 1855, before Sir *J. B. Robinson*, Chief Justice of Upper Canada, when a verdict was rendered for the plaintiffs, with £2186 1s. 9d, damages.

A rule *nisi* was obtained in the following term to set aside this verdict and enter a nonsuit, pursuant to leave supposed by defendants' counsel to have been reserved, or for a new trial on the ground of misdirection and on affidavits filed.

Statement:

After argument in Michaelmas Term 1855, the Court of Common Pleas made the rule absolute for a new trial, and by that rule absolute it was ordered, that the verdict obtained should be set aside and a new trial had between the parties. And the plaintiffs now appeal from the judgment of the court in making said rule absolute and from said rule.

The grounds upon which the plaintiffs' counsel opposed the said rule *nisi* before the said Court of Common Pleas were the following: that no leave was reserved at the trial to enter a nonsuit; that the order on *Hackett* for the delivery of the flour, signed by *Cluxton* in favour of defendants, and their subsequent transfer of said order to *Goodenough*, and *Goodenough's* transfer to the plaintiffs, did not vest the property in the flour in the plaintiffs on receipt of said order by them.

That the defendants having themselves acquired no

property in the flour under that order could not make any appropriation of it to the plaintiffs. 1856,

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That there could be no delivery of the flour in pursuance of the terms of the contract while any thing remained to be done by the defendants, and until the same was actually placed on board the plaintiffs' vessel.

That there was no delivery and acceptance of the said flour sufficient to vest the property in it in the plaintiffs, either under the contract or otherwise.

That the order on *Hackett* was never accepted, and consequently there could have been no delivery of the the said flour.

That the charge of the learned judge to the jury was correct and unobjectionable, and the finding of the jury was a correct finding.

Statement.

That the affidavits filed disclosed no ground for granting a new trial, no reason being shown why the parties making those affidavits were not in attendance at the trial, and did not then disclose the alleged facts or circumstances detailed in said affidavits, and said affidavits containing no new matter which ought to be considered of sufficient importance to disturb the verdict.

The ground upon which the plaintiffs appeal from the judgment of the Court of Common Pleas in granting a rule absolute for a new trial, are that for the reasons above stated or some of them, the said rule should have been discharged and the verdict of the jury allowed to stand.

The defendants contend that they performed their contract. That what was done amounted in law to a delivery of the flour, and vested in the plaintiffs property therein.

That the learned judge misdirected the jury at the

1856. trial, and should have left it to them to say whether
Coleman *Hackett* was not before the fire holding the flour as the
McDermott plaintiffs' property.

That he ought to have charged the jury to find, and they ought to have found a verdict for the defendants. That the affidavits filed shew sufficient grounds for granting a new trial, and that the rule absolute for granting a new trial in this cause should be sustained, and the judgment of the court below affirmed.

Mr. Connor, Q. C., and Mr. Galt, for the appellants.

Mr. Vankoughnet, Q. C., for the respondents.

The cases relied on by counsel appear in the judgment and in the report of the case in the court below, where the pleadings and the evidence in the cause are clearly and fully set forth.

Judgment. SIR J. B. ROBINSON, BART., C. J.—I do not think any difficulty is created in this case by the circumstance that the action is brought in the name of three plaintiffs, while the broker seems to have been under the impression that he was making the bargain only in behalf of two. The defendants have founded upon this variance an objection to the plaintiffs' recovery, but whether it arose from the broker not being fully informed of all who were to have an interest in the flour he was buying, or from his mistaking his instructions, it is of no moment; the question is who were really the parties, and in many cases of this kind the objection has been held not be fatal.

Then as to the main question. An accidental fire has occurred, by which 1000 barrels of flour, which it was intended were to pass from the defendants to the plaintiffs, have been destroyed before they got into the actual possession of the plaintiffs, or (as I suppose the defendants would rather the fact should be stated) before they had been shipped by them for the plaintiffs, as they

were to be, free of charge. It is not pretended that either party was to blame for the accident by which the flour was destroyed, and it is quite natural under the circumstances that each should desire to escape from the loss by throwing it upon the other.

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When the facts of such a case are ascertained, as I think they have been in this, in regard to all essential particulars, it rests with the law to determine upon which of the parties the loss must fall, and when a clear conclusion can be arrived at upon admitted legal principles, the losing party must submit as he would to any other misfortune however the case may seem to him; for the law must be allowed to govern, otherwise, dealers in such transactions would never know their rights, and there would be utter uncertainty in conducting a description of business in which the utmost certainty is desirable.

When this case was before me at *nisi prius*, I saw Judgment. that there was a large amount of money at stake, and that some rather nice points were to be determined between parties, none of whom, I am persuaded, are insisting upon any thing that they think wrong, and I intended to have confined myself to obtaining the conclusions of the jury upon the facts, leaving the law to be determined by the Court of Common Pleas, which was in possession of the cause, without prejudice from any opinion of mine hastily formed at *nisi prius*, which could be of little value, but one of the parties would not agree to the course which is usual on such occasions, though it cannot be taken without consent, and acting upon the view which I then took of the case, I told the jury that taking the facts to be as they had found them, I considered that the plaintiffs were entitled to their verdict.

The Court of Common Pleas taking a different view of the law has granted a new trial, and it is most probable they are right, but as I have not with the advan-

1856. tage of further consideration come to that conclusion, I must give the opinion which I entertain.

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There seems to have been no difficulty or misunderstanding in regard to the place of delivery.

The plaintiffs had received part of the 4,000 barrels at Cobourg, and part at Port Hope, and they seem to have been content to take the flour at either place.

Then, on the 12th April, 1855, the defendants bound themselves to deliver 4,000 barrels of Peterboro' mills flour free on board at 22s. 6d.; 2,000 on or before 1st May next, and 2,000 before 1st June next. Cash to be paid on delivery, or on warehouse receipts.

There is seldom, I dare say, any misunderstanding between parties as to what is meant in such cases by the undertaking to deliver "*free on board*."

Judgment.

All that the buyer cares about is too plainly expressed to admit of doubt. He is to have the flour on board at the price per barrel that has been named, without any addition on account of charges or expenses of any kind, and whether the seller puts it on board the vessel that is sent to receive it, or whether the buyer is left to do it at the expense of the seller, is so much the same thing that it is not likely to raise a question; but in strictness I take it the meaning and effect of the undertaking is the same as it would be if the seller engaged to deliver the flour into the buyers' warehouse free of charge.

I consider that the sellers in the present case, if they chose, might have insisted that it was their part to put the flour on board the vessel, and that the buyers could not against their will interfere with the possession of the flour till they had got it on board, and if so, it must follow that the buyers could insist upon that being done by the sellers, for either party may insist upon the contract being carried strictly into effect.

This is as to the manner of delivery: then as to the time, there can be no doubt that in all such cases time is the very essence of the contract. The lapse of a single day, the arrival of a packet may produce a change in the flour market very injurious to holders, and to those who are under contract to deliver at certain specified prices. The trade could therefore not be carried on with safety unless parties were allowed to insist upon strict punctuality as to the time of delivery.

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Now in this case, the last 2000 barrels of flour were to have been all delivered by the 1st June. The defendants it appeared had made up their minds to deliver that flour at Port Hope, but they had it not ready at the day. The plaintiffs had been enquiring of the broker at Toronto, anxious to hear of its being ready for them. On the 6th, as the defendants allege, they had in *Hackett's* store at Port Hope the quantity of flour which they ought to have had there on the 1st, and on the 7th they wrote communicating the fact to the broker at Toronto. The plaintiffs did not receive the information till the 9th June. They had, it seems, made arrangements for the sale of the flour in New York, having reference to the time when they would have been in a condition to deliver it if the defendants' contract with them had been fulfilled, and before they would accept of this late delivery they desired to learn whether the persons who had agreed to purchase it from them would abide by their contract. They were entitled to take the time that was necessary for ascertaining this, and as soon as they had received an answer, which they were satisfied with, they telegraphed to Oswego to have a vessel sent across to take in the flour and convey it to that port. Their instructions were promptly given and carried promptly into effect, and on the 15th June their vessel arrived at Port Hope to receive the flour. It was sworn at the trial by a witness conversant with the trade, that there was no want of reasonable diligence in the plaintiffs' arrangements, from the time they were apprised of the flour

Judgment.

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being ready, but, on the contrary, that they were active and prompt. The jury also found that the plaintiffs had lost no time in sending the vessel, and any one acquainted with the commerce between the lake ports would come, I should think, to the same conclusion. This being so, it is the same as if the plaintiffs' vessel presented itself at Port Hope on the 1st of June, and the master on applying for the flour had been told that it could not be delivered, because it had been burned in the warehouse the night before; for the delay which occurred had been for the convenience of the defendants and not for the plaintiffs. That the defendants could not deliver what they had undertaken to deliver would of course be no excuse. But the defendants contend that by what had taken place the plaintiffs did in fact get the flour, that it was the plaintiffs' flour and not the defendants' which was burnt in *Hackett's* warehouse; that the plaintiffs are the persons, therefore, who must bear the loss.

Judgment.

That the plaintiffs had paid for the flour without actually receiving it cannot place them in a worse situation than they would otherwise have been in. If they had paid for all the flour in advance, relying upon the defendants' contract being fulfilled, that could have made no difference against them. They paid the money after receiving the message on the 7th June that the flour was ready for them, but that was because the defendants through the broker were pressing for it. The plaintiffs did not pay without hesitation, seeing that the order was not even accepted, and all that can be said of that is that they were satisfied with the broker's responsibility and were not afraid to run the risk. It would be unfair towards the plaintiffs to treat the payment thus made by them as an acknowledgment that they had no further claim, and that the defendants had fulfilled the contract.

Then as to the other facts in the case, assuming as I

do, that the last 1000 barrels of flour had been delivered in *Hackett's* store, and had been there piled up apart from other flour, as intended for the plaintiffs, upon some understanding that had taken place between the defendants and *Cluxton*, who had sold the flour to them, that was only in the nature of things an arrangement made by the defendants, and if it had been shewn in the clearest manner that they had gone to the warehouse-keeper *Hackett*, and told him that the 1000 barrels last sent by *Cluxton* were intended to be shipped for the plaintiffs, and must be kept apart by him for that purpose, that would only have shewn that they made such arrangements as they found most convenient for enabling themselves to fulfil their contract, not literally as to time, but later than had been appointed if the plaintiffs should be willing to accept it.

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The warehouse in which the flour was deposited was not the plaintiffs' warehouse, nor one over which they had any control.

Then there is only this further fact in the case, that *Cluxton*, having from time to time sent in flour to be stored in *Hackett's* warehouse, on the 6th June sent to the defendants from Peterboro' an order upon *Hackett* to deliver to them 1000 barrels of flour of the Peterboro' and Otonabee mills, "free on board," and to charge him with the wharfage, on which order the defendants, without getting it accepted by *Hackett*, endorsed a direction to *Hackett* to deliver the flour to *Goodenough*, the broker, or order, and *Goodenough* endorsed it to the plaintiffs.

It seems that when *Cluxton* wrote that order on the 6th June, he had not then in the store the full quantity of flour, though all that was deficient arrived soon after. This order not accepted by *Hackett* was not binding upon him, and did not pass the property so as to put it beyond the control of the defendants. All that can be said of it is, that it enabled the plaintiffs to go with it in their

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hands, as it appears Mr. *Proudfoot* did before the flour arrived, and to shew to Mr. *Hackett* that he would be safe, if he chose to do it, in letting him have the flour, and that the plaintiffs were authorised to call upon him to deliver the flour at least on the wharf, and in strictness on board of the vessel free of charge.

I do not see how it can be held in this case that nothing remained to be done by the vendors. *Hackett* still held the flour as their agent, he had not attorned to the plaintiffs, and if when the unaccepted order came to him he had received no contrary instructions, and was willing to comply with it, and if this flour had been still in store, he would still have had a service to perform on behalf of the vendors, that is to produce the flour on the wharf, and to pay the wharfage, and to ship it also, as I think, if that should be required of him.

Judgment.

The plaintiffs, it appears to me, were not in a position to maintain trover for the flour at any time before it was destroyed, either against the wharfinger if he had refused to deliver it, or against *Cluxton* or the defendants if they had diverted the flour into any other channel.

I take this to be so clear in reason as well as in law, that if the price of the flour had not happened to have been paid before it was burnt, I doubt whether the defendants would have been disposed to sue for the amount which they were only entitled, by the very terms of the contract, to receive upon delivery of the flour or of a warehouse receipt for it, for they could hardly have supposed that an unaccepted order upon the warehouse keeper amounted to a warehouse receipt.

But if they could not have recovered the price under these circumstances they can no more retain it, having been paid as it was in reliance upon their fulfilment of the contract. The plaintiffs may fairly say to the defendants, "We were not bound to pay you the money till

you had delivered to us the flour free on board or a warehouse receipt; you have never in fact done the one thing or other, but as you were pressing for the money and shewed us that you had in store a sufficient quantity of flour ready to be delivered, we paid the money, trusting that all would be right. We have since called upon you for the flour, and you have failed to deliver it as you engaged to do, pay us back therefore our money."

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All that the defendants allege is, we should have had the flour to deliver to you if it had not been burnt. That is a misfortune against which they could have guarded by insurance—not having done so there is a loss to be borne by the one party or other. Mr. Justice Bayley, in *Tarling v. Baxter*, (a) says: "it is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire." And the plaintiffs not having purchased from the defendants any specific lot of flour, but only contracted for a certain quantity to be delivered to them, and not having the flour that was burnt ever placed under their control, or delivered into their possession, or acknowledged by any one to be held for them, and in their name, I think it clear that the loss rests with the defendants and not with them. In the case of *Williams v. Everett*, (b) Lord Ellenborough states the rule which is to be applied in such cases very clearly. "In all cases" (he says) "of specific property being lost in the hands of an agent, when the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent."

Judgment.

Surely there is no ground on which it can be held that *Hackett* in this case was the agent of the plaintiffs, whatever he might have been if he had accepted *Cluzton's* order, or had in any other manner made himself

(a) 6 B. & C. 863.

(b) 14 E. R. 597.

1856. responsible to the plaintiffs, cases on this point are numerous; it is sufficient to cite *Bentall v. Burn*. (a)

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And it is material to consider in this case, that the order on *Hackett*, which was yet unaccepted, and not even shewn to, or communicated to him before the flour was burnt, was not an order to deliver it to the plaintiffs but to the defendants, and if it did not by mere force of the order to deliver operate as a transfer of the property and possession to the defendants, then the defendants had not up to the time of the fire even the ability to deliver the flour in question. It is necessary, moreover, to consider that the application of a large class of cases which the defendants' counsel have relied on, is excluded by the fact that the contract in this case was not for the purchase by the plaintiffs of any specific parcel of flour then belonging to the defendants, but was an executory contract binding the defendants to deliver free on board flour of certain descriptions, to be paid for on delivery or production of warehouse receipts.

Judgment.

These last words must be taken to mean different things, not one and the same; that the flour was not actually delivered into the possession of the plaintiffs is certain, and equally certain that the plaintiffs never got the warehouse receipts. And as to the defendants having ever put it in the power of the plaintiffs to obtain immediate possession, it is plain they did not, for the plaintiffs called for the flour as soon as they could after hearing that it was ready, and neither got nor could get any flour, nor did they hold any document by which they could have compelled the delivery of the flour by the warehouse keeper if it had then been in the warehouse.

In the multitude of cases on this important branch of the law, there are some which are apparently contradictory, and some that have been expressly overruled.

(a) 5 D. & R. 284.

The tendency of the more modern decisions is to limit within more precise bounds than formerly the effect of a mere delivery order; those which turn upon the right to stop in transitu, and upon the sufficiency of an acceptance under the statute of frauds only embarrass such cases as the present, because they have been disposed of on different considerations and are not applicable.

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Among those which are free from this objection, that of *Alexander v. Gardner* (a) appears to support the most strongly the defendants' case, but supposing that case to be rightly decided, it differs in this respect from the present, that there the goods had been already shipped "free on board" by the plaintiff, who was suing for the price, and the defendants had received and retained the bill of lading. The contract was therefore held to have been complied with.

Bills of lading and delivery orders are not recognised as standing on the same footing. If they were, it would be impossible I think to reconcile the judgment of the court in *Alexander v. Gardner*, with the late judgment in the Exchequer in *Farina v. Home*. (b)

Judgment.

The court finds in this case that the judgment of the court below appears to have proceeded upon assuming, as a fact, that the defendants had set apart in *Hackett's* warehouse a certain 1000 barrels of flour to answer upon their contract with the plaintiffs, and that their delivery order referred to such specific 1000 barrels set apart by them in the warehouse for that purpose.

We do not see such a setting apart of a precise quantity, or 1000 barrels to the defendants, distinct from all other flour, made out by the evidence, and according to the report of the two judges of the Court of Common Pleas, who concurred with the late Chief Justice, in that

(a) 1 Bing. N. C. 671.

(b) 16 M. & W. 119.

1856. judgment it appears to be fair that we should take the judgment to be nothing more than the expression of the opinion of the court, that if this assumed fact existed, such would be their conclusion upon the legal right of the parties, and that if it be understood to be denied by the counsel that the fact assumed has been established in evidence, there should be a new trial in order to have that question of fact ascertained.

Coleman
v.
McDermott.

It appears to us that a new trial was ordered upon the principle, that either the fact was so, in which case the verdict was wrong, or that there is this fact asserted on the one side and denied on the other, and not found one way or the other, and therefore we think it due to the parties to suffer the new trial to take place, as it may turn out to be a material fact in the decision of the case.

Judgment. The appeal is therefore dismissed, reserving the costs of the appeal for future consideration, and leaving the new trial to take place on the terms in which it was ordered.

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[Before the Hon. Sir J. B. Robinson, Bart., C. J., the Hon. W. H. Draper, C. B., C. J. C. P., the Hon. Vice-Chancellor Esten, the Hon. Mr. Justice Burns, the Hon. Vice-Chancellor Spragge, the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.] 1861.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

ROBERTSON V. MOFFATT.

Maker and endorser—Evidence—Statutes 5 W. IV., ch. 1, and 12 Vic., ch. 70.

The effect of the 12 Victoria, chapter 70, commonly called "The Evidence Act," was not to repeal the 5 William IV., chapter 1: where, therefore, the maker and endorser of a promissory note were sued together in one action, and each pleaded a plea setting up want of consideration for making and endorsing the note respectively, *held*, that this did not preclude the one defendant calling and examining his co-defendant to prove the truth of such plea in favour of the party so calling him.

This was an appeal by the defendants from the judgment of the Court of Queen's Bench, in the suit of *Moffatt v. Robertson*, as reported in the reports of that court, volume xix., page 401, where the pleadings and facts are fully set forth. Statement.

Mr. Hector Cameron, in support of the appeal, referred to *Hamilton v. Phipps*. (a)

Mr. Eccles, Q. C., for respondents, relied upon the reasons assigned by the court below in delivering judgment as a ground for sustaining the judgment. He also referred to the Consolidated Statutes, chapter 32, sections 3 and 5, and chapter 42, section 27.

The judgment of the court was delivered by

DRAPER, C. J.—The plaintiffs have sued the defendant *Robertson* as maker, and the defendant *Beamish* as endorser of a promissory note. Each defendant has separately (among other answers) pleaded that the

(a) 7 Grant, 483.

1861.

Robertson
v.
Moffatt.

note was made and endorsed in part performance of an agreement between plaintiffs and defendants, that defendants would respectively make and endorse this and some other notes and deliver them to the plaintiffs in consideration of plaintiffs assigning to them a certain judgment, and which judgment the plaintiffs never have assigned, and that, therefore, there never was any consideration for defendants making or endorsing, or for plaintiffs holding the note sued upon. The defendant *Beamish* also pleaded *non indorsavit*. Issue was taken by the plaintiffs, who at the trial called the defendant *Robertson* exclusively for the purpose of proving the endorsement by *Beamish*. After *Robertson* had given this testimony, *Beamish's* counsel desired to cross-examine him for the purpose of proving *Beamish's* plea, that the plaintiffs held the note without consideration. The learned judge refused to allow such cross-examination, and he also refused to allow *Beamish*, who was called as a witness for *Robertson*, to be examined for a like purpose. The plaintiffs thereupon obtained a verdict, and the defendants subsequently took out a rule *nisi* for a new trial on the ground that the learned judge's ruling in this particular was incorrect. The Court of Queen's Bench after argument discharged the rule, and the present appeal is brought against that decision.

Judgment.

But for the statute of Upper Canada, 5 William IV., chapter 1, the plaintiffs could not have sued these defendants in one action on the note declared upon. The legislature in passing that statute certainly did not intend to place parties to bonds, bills of exchange, promissory notes, &c., under any disadvantage in defending themselves against unjust demands, while it was intended to prevent costs being incurred in separate suits against several parties to the same instrument, first, by enabling the holders to sue all the parties in one action, and second, by depriving the holders of the right to recover any costs beyond disbursements in more

than one action, unless there were circumstances to prevent all such parties being sued together. 1861.

Robertson
v.
McCall.

The act, though in one sense enabling, was intended as a restriction upon plaintiffs, not on defendants, as to whom it expressly provided that in every suit brought under its provisions, any defendant should be entitled to the testimony of a co-defendant, if he would have been so entitled had the co-defendant not been a party to the suit or individually named in the record.

It is not denied that if the plaintiffs had brought separate actions against these defendants, each would have been entitled to the testimony of the other, though each relied upon the same identical defence. The fact that the defence, if true and if proved, would discharge the party called as a witness in the action in which he was defendant, would afford ground to dispute his credibility, but not his competency. He would be competent, because the verdict rendered upon his testimony would not be evidence on the trial of the action against himself. It would make no difference if the self-same jurors who acted upon his evidence were also empanelled to try his defence, for if they acted without proof on the second trial, because of what had been proved on the first, the court would set aside their finding, and grant a new trial. And so, I apprehend, under the Act 5th William IV., if one defendant had called another to prove his defence, and the defendant's witness made a statement in his own favour, in consequence of which the jury rendered a verdict for both defendants, the court would grant a new trial as to the defendant, witness, while upholding the verdict in favour of the other, for the statute expressly authorized the rendering judgment in the plaintiff's favour against some defendants, and against the plaintiff in favour of others; maintaining a complete severance, according to the different circumstances of the rights of the respective parties; and to effect this completely, the power to grant a new trial in

Judgment.

1861

Robertson
v.
Moffatt.

regard to some defendants, and to refuse it to others, must inevitably be conceded.

Judgment.

If then the only argument against the admissibility of the evidence in the present case be that the jury having the testimony of one defendant in favour of the other will or may apply it in favour of the defendant, witness, as well as of the other defendant, I cannot, with every respect for contrary opinions, admit its validity. It cannot be affirmed truly that the evidence given by one defendant to sustain the plea of another is, in point of law, evidence to support a similar plea pleaded by the witness, and though in point of fact a jury may misapply the evidence to an issue or issues on which it is inadmissible, yet this does not, as I think, justify its entire exclusion. The case of *Regina v. Seafie*, (a) which is all the stronger because it was a prosecution for felony, leads to a contrary conclusion. There, on the trial of three prisoners, it appeared that one of them had, by contrivance, kept away a most material witness, and in consequence, the deposition of that witness, as taken before the magistrate, was put in evidence. The learned judge omitted to direct the jury that this deposition was evidence as against that prisoner *only*, by whose contrivance the witness was absent. The jury acquitted that prisoner and convicted the others, and the court granted a new trial, not because this evidence was admitted, but because the jury were not told to confine its application to the case of the one prisoner who had kept the witness away. Again, where several accused parties are put together on their trial, the confession of one is evidence only against himself, even though it implicates others by name; the presiding judge must instruct the jury that it is not evidence against any but the prisoner who made it. (b)

But the argument apparently most relied upon by the

(a) 17 Q. B. 238, 5th Cox 243.

(b) Taylor on Evidence, sec. 795, 2nd ed.

plaintiff's counsel was the effect of our Evidence Act, which provides against "any party" to any suit or proceeding, individually named on the record, (among others,) or any person in whose immediate or individual behalf any action may be brought or defended, being called as a witness "*on behalf of any party.*" It was urged that this enactment was at variance with the 9th section of the 5th William IV., chapter 1, and therefore it must be treated as having virtually repealed it.

1861.

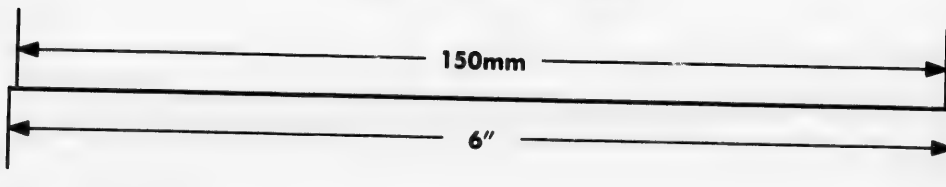
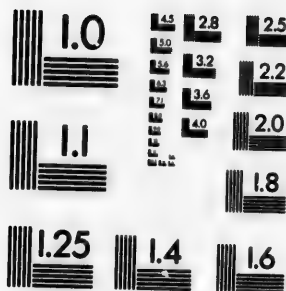
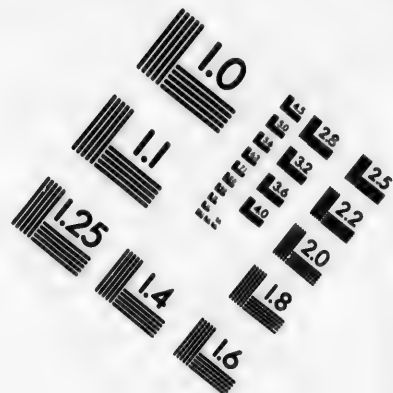
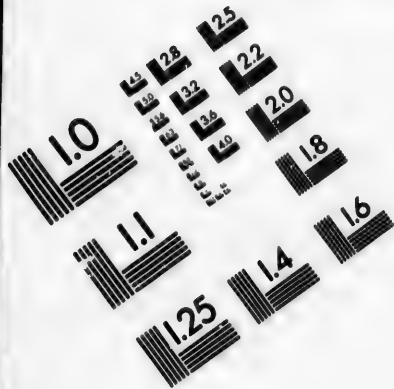
Robertson
v.
Moffatt.

I fail to perceive any such consequence, for it appears to me both enactments may stand together, and that the legislature intended they should stand together. A cogent proof of the intention of the legislature is to be found in the fact that both the enactments are repeated in the Consolidated Statutes of Upper Canada, and a close and careful consideration of the language used in the Evidence Act, to my apprehension, shews that the two enactments are not in reality conflicting. The Evidence Act, after a clause which would, if unqualified, render *every* person, and under every relation, a competent witness, in spite of interest and crime, is limited and qualified by a special provision, by which no party to any suit or proceeding named on the record, or on whose immediate or individual behalf any action is brought or defended, is rendered competent or permitted "to be called as a witness *on behalf of such party,*" or in other words, in his own behalf. The 9th section of the 5th William IV. did not enable a party to give evidence for himself, it simply prescribed the right which (as the law stood when it was passed) every party had of proving his defence by the testimony of any person whose rights would not have been affected by a verdict upon the issue, in regard to which his testimony is given. And the third section of the Evidence Act simply retained, as to the parties excepted, the rule of law theretofore prevailing, and which, but for this exception of particular parties, would have been wholly rescinded by the first section. This first section does

Judgment.



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1861. not restrict the 9th section of the 5th William IV.; on the contrary, it goes beyond it, and I confess I do not see on what ground the third section, which is expressed as a limitation of the effect of the first, should be construed to be a virtual or implied repeal of the 9th section of the 5th William IV.

Robertson
v.
Moffatt.

Judgment.

It is not, as already observed, denied that if the plaintiffs had sued these two defendants in separate actions, and each defendant had pleaded the same pleas as now, each might have been a witness for the other. I venture to affirm that by the statute 5th William IV., the legislature intended to reserve the same defences, and the same means of proving them as each defendant would have had if that act had not been passed; and it appears to me the Evidence Act was not designed, nor is it so worded as to create any real obstacle to the former act being construed and acted upon in the same manner as before the Evidence Act was passed. I think that a defendant, the maker of a promissory note, who is called as a witness to prove the plea of an indorser, is not called to give evidence on his own behalf, though he may have a plea on the same record, raising the same defence, and though his evidence, if admissible for that purpose, would prove his own plea. In such a case the jury should be directed what plea his evidence is applicable to, and what not. There can be no presumption in law that the jury will disregard such a direction, and if, unfortunately, they should do so, the court has the power to grant a new trial as to that defendant in whose favour a verdict has been improperly rendered.

For these reasons I am of opinion that the judgment of the Court of Queen's Bench should be reversed, and that the rule which was obtained on behalf of the defendants should be made absolute, without costs.

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1852.

[*Before the Hon. John Beverley Robinson, Chief Justice, the Hon. William Hume Blake, Chancellor, the Hon. James Buchanan Macaulay, C. J. C. P., the Hon. Mr. Justice McLean, the Hon. Mr. Justice Draper, the Hon. Mr. Justice Sullivan,* the Hon. Vice-Chancellor Esten, the Mr. Justice Burns, and the Hon. Vice-Chancellor Spragge.*]

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

DOE DEM. HENDERSON V. WESTOVER.

Held, on appeal from the judgment of the court below, that the purchaser from the government of a clergy reserve, upon which he has paid an instalment of his purchase money, and obtained the usual receipt from the Crown Lands Department, has a right to obtain possession against any one in the occupation, and that, although the occupant may have subsequently obtained the receipt of the Commissioner of Crown Lands; the Crown, under such circumstances, being bound by the contract made by the department with the first purchaser. [BLAKE, C., ESTEN and SPRAGGE, V.CC., dissenting.]

This was an appeal from a judgment of the Court of Queen's Bench, brought by the defendant in the action.

Statement.

The facts giving rise to the case, as also the grounds of appeal, are distinctly stated in the judgment delivered by his Lordship, the Chancellor.

Mr. Baldwin, Q. C., and Mr. S. Richards for the appellants.

Mr. John Hillyard Cameron, Q. C., and Mr. Galt, for the respondents.

ROBINSON, C. J.—I continue of the opinion that the plaintiff was entitled to recover, for the reasons given by me in the court below.

Though a person has in many cases difficulty in

* Gave no judgment, having been concerned in the case while at the bar.

1852. enforcing a right against the Crown, having no adequate remedy that he can pursue, on account of the prerogative which exempts the Crown from direct responsibility to the legal and equitable tribunals, and prevents those measures of coercion which in other cases are necessary for enforcing rights, yet those difficulties do not apply, where a person is simply standing upon a right, which he claims to have acquired from the Crown, and where he wants nothing more to be granted or done by the Crown. The lessor of the plaintiff, in this case, I look upon as in effect standing in that situation, as regards any question that this case may give rise to, directly or indirectly, as between him and the Crown.

*Henderson
v.
Westover.*

He may urge that he wants nothing more to be conferred on him by the Crown, and is only in fact defending himself against an assumed right of the Crown to interpose to his prejudice, and to deprive him of the right acquired by his contract with the government, by supporting the present defendant, in keeping him out of possession. In defending himself against the Crown, the subject is under no disadvantage, but may contest the alleged right or claim of the Crown as fully as he can the right or claim of a fellow subject.

Judgment.

Here the Crown, after selling to *Henderson* and taking his money, gave him a receipt, to which the statute gives the same effect as a patent; and further, the statute provides in express terms that the vendee of the Crown, on making his payments, shall have a right to receive a patent.

This vendee has made no default, and is therefore entitled to the benefit of his contract.

If *Henderson* were in possession the Crown could not treat him as an intruder, for the statute gives him a right to the possession. And if the Crown could not dispossess him, it could give no right to any other to turn him out, or hold him out of possession.

It might be shewn, if the fact were so, that the sale to *Henderson* had been improvidently made; or that he had obtained the purchase by fraud, in which case, even if he had got his patent, he might be made to lose all benefit of it. But nothing of that kind is shewn here; on the contrary, if the Crown, after selling to *Henderson*, had sold to *Westover*, and had taken his money and given him a patent, without other ground than has been shewn for attempting to rescind the sale to *Henderson*, that patent would be subject to be repealed, as having improvidently issued, and might be held void even in a court of law, (though not repealed) if the facts, as they existed, appeared on the face of it.

1852.

Henderson
v.
Westover.

The argument on defendant's side goes, and must go, the length of maintaining, that after selling to *A.*, and being paid in full, and though *A.* has made improvements to greater value than the land, the Crown can (if they will) sell to *B.*, and if they do, that *B.* has the right to possession and not *A.*, and that if he is in possession, or gets into possession, *A.* cannot eject him, because *B.*, being supported by the Crown, *A.*, though he derives his right under a prior purchase from the Crown, cannot treat him as a wrongful possessor. I cannot accede to this. If *Henderson*, when he got his receipt, had gone to the land and found this defendant in possession, of whom, or of any claim of his he had never before heard, and if on inquiring of him by what right he was there, the latter had told him that he had no right, that he had meant to purchase, or thought of purchasing, but had taken no steps, and had entered into no contract, and had therefore nothing to shew, could not *Henderson* have rightly told him that he was a trespasser and wrongful possessor, and must give up the land? I think so. Then, if he could, I conclude that the Crown had not a discretion to change the state of things by electing, as an act of indulgence or liberality, to set aside their first contract and allow the defendant to purchase, and thus make his possession

Judgment.

1852. rightful, which was before wrongful in respect to
Henderson.

Henderson
v.
Wentworth.

It may have been unwise for the Crown to have disabled itself, by concurring in the provisions of the statute, from exercising a free choice to the last moment in making patents of their lands, in order that they might have reserved a perfect control over all pledges and promises, up to the moment of affixing the great seal; but I do not think the statute reserves that power in the case of sales, nor that it meant to do so. And when the Crown does resolve to sell its lands, its contracts ought to be binding upon it, in the absence of deceit or fraud of any kind; for it is a maxim that where the Crown receives a valuable consideration for its grant, there the effect of the patent shall always, for the honor of the Crown, be allowed most strongly in favor of the grantee. In case of gratuitous grants the rule is otherwise.

Judgment.

This is all independent of the facts, which strengthen this plaintiff's case; that the land in question was a Clergy reserve, directed by a statute to be sold under certain regulations, established by authority of the act, according to which regulations, persons in the situation in which this defendant is shewn to have been, have no claim to any pre-emptive right, but expressly otherwise.

Whatever doubt I might have had in this case, would of course have been increased, if our judgment had appeared in conflict with the opinions of the court in *Boulton v. Jeffrey*, (a) in appeal from the Court of Chancery in this province. But there is no such inconsistency. It is the effect of the statute in this case which makes the difference, with the fact that there the patent had actually issued, and the court were desired to decree that the patentee held his land in trust for another person, against whose right to a grant the Crown had determined; in other words, to substitute the declaration

(a) Ante p. 8.

of a trust by decree of this court for the ordinary and proper remedy by *Scire Facias*, to repeal the patent if it had providently issued, a proceeding which would have found no sanction in any statute of this province, or in any course hitherto taken in equity, that I am aware of. *Jeffrey* was not the prior purchaser of the fee from the Crown as *Henderson* is in this case, holding the receipt for payment of purchase money. That case was attempted to be supported on the principle, that wherever it could be shewn that another person had a better claim to expect a grant than the person who has received it, the patentee in whose favor the Crown has decided, may be held to be a trustee for the person whose claim the Crown rejected, a principle which could not be conceded.

1852.

Henderson
v.
Westover.

In *Boulton v. Jeffrey* the judgment of the court supported the title of the first purchaser from the Crown, or rather of his assignee, who had actually obtained his patent; and the court refused to treat the patentee as holding in trust for the benefit of another party, against whose claim to a patent the government had deliberately decided. Besides, the case now before us turns wholly on the effect of a clause in the Land Sale Act, which act was not, and could not be in question in *Boulton v. Jeffrey*, not being then applicable to Clergy Reserves, (a) nor until the legislature, many years afterwards, passed an act, 12 Victoria, chapter 31, for that purpose.

BLAKE, C.—The premises in question in this cause are vested in her Majesty, in fee simple, in right of her crown.

The lessor of the plaintiff entered into a parol agreement for the purchase of this property with the Crown Land Agent for the then Western District, on the 7th of December, 1846, when he paid the first instal-

(a) See Doe dem. Weinsenberger v. McGlennon, 5 U. C. Q. B. 138.

1852. ment of the purchase money, and obtained a receipt,
Henderson which is admitted to be in accordance with the provisions
v. of the 18th section of the statute 4th & 5th Victoria, ch.
Westover. 100.

On the 7th of December, 1847, a second instalment of the purchase money was paid, and a similar receipt obtained.

These receipts constituted the title of the lessor of the plaintiff.

Judgment. On the other hand it was proved, that, subsequent to the sale to the lessor of the plaintiff, the defendant had petitioned the executive government to be permitted to purchase the property in question, upon the ground of prior occupation and improvements. That on the 2nd of April, 1849, his Excellency the Governor-General in council was pleased to order that the defendant should be permitted to purchase the property in question, if he should so elect, in which event the money paid by *Henderson* should be returned, and the sale to him cancelled; that, in December, 1849, the defendant, in pursuance of the aforesaid order in council, became the purchaser, paid two instalments of the purchase money, and obtained a receipt from the district agent in accordance with the provisions of the statute; that this action was commenced in July, 1850, when, upon the petition of the defendant, his Excellency the Governor-General, in council, was pleased to order her Majesty's Attorney-General for Upper Canada, to take proceedings to resist the action; and that, under such order, the Attorney-General appeared and defended the action.

The jury found a verdict for the defendant under the direction of the learned judge who tried the cause, with permission to the plaintiff, however, to move that a verdict should be entered for him if the court should consider him entitled to recover.

In pursuance of the leave reserved, the Court of 1852. Queen's Bench, upon motion, ordered that the verdict should be entered for the plaintiff, and the case comes before this court on appeal from that order.

Henderson
v.
Weslover.

Upon the best consideration I have been able to give this subject, I am of opinion with the learned judge who tried this cause, that the plaintiff is not entitled to recover, and that the order appealed from should therefore be reversed.

Prior to the statutes under which the lessor of the plaintiff makes title, such a proceeding, either against the Crown or its vendee, must have been, of course, unsuccessful. An ejectment against the Crown must have failed for various reasons too obvious to require mention, but amongst them for this reason, to which it is material to advert, that the title of the Crown could not have been tried in an action of ejectment. Judgment. It was, and I presume is, an undoubted prerogative of the Queen, that no action will lie against her. She is the fountain of justice. All judicial writs are in her name. But, as it is expressed by Mr. Justice *Blackstone*, who shall command the Queen? (a) It is repugnant to reason that the Queen should command herself; and to the *fundamental principles of the constitution*, that she should be commanded by her own courts. If, therefore, an action of ejectment had been brought involving the Queen's title, the Court of Queen's Bench, I presume, would have refused to permit such action to be tried.

Cawthorne v. Campbell (b) is a leading authority upon this subject. In the learned judgment delivered by Lord Chief Baron *Eyre* in that case, I find this passage: "There is only one other case which I shall have occasion particularly to mention, and that I can hardly class immediately under any of these heads; but it

(a) 3 Black. Com. 355; Com. Dig. Perog., D. 70, action c. 1.

(b) 1 Anst. 215.

1852. would rather seem to belong to that class of proceedings where the court acts by injunction without removing the action; that was on the 10th of February, 1710, an ejectment brought in the Court of King's Bench; and it was, as to part of it at least, for lands which were part of the Queen's estate. There was an application to this court to stay the proceedings, and the parties were heard upon it. The Attorney-General attended, and after the hearing it was put off a day or two; at length the entry is that an injunction issued from *Domina Regina*. So that the action was not removed, but simply an injunction went to stay proceedings. And I think I can see why that was, *if the action had been removed the question could not have been tried, even in the Office of Pleas, because you cannot try the Queen's title in an ejectment.* The Queen was in possession, her hands must be removed by some other course of proceeding than an ejectment; *and therefore it was fruitless to think of removing it,* and it remained under an injunction; *It may be said that it might be as well left to the King's Bench to determine that they could not recover the Queen's land in ejectment.* To be sure they might if the prerogative of the King had not been, that the King had a right to prevent that question being discussed *there*, and to have it discussed *here*, and that is what was done. (a)

Judgment.

In a recent case of trespass, *quare clausum fregit*, the defendant pleaded that her Majesty was seized in fee, in right of her Crown, of the forest of Waltham, and that the plaintiff having wrongfully enclosed a portion of the forest, the defendant, as the servant of her Majesty, and by her command, entered and pulled down the fences. This action was brought in the Court of Common Pleas, and the Attorney-General, upon his simple allegation that the profit of the Crown came in question, without any affidavit, applied to have the cause removed into the Exchequer. In delivering judg-

(a) Attorney-General v. Hallett, 15 M. & W. 97.

ment upon that motion the Chief Baron observed: 1852.
 "The action of ejectment is, *prima facie*, an action
 merely between subject and subject, and relates to land,
 yet the prerogative of the Crown applies to that; and
 if the interest of the Crown is concerned, an action of
 ejectment may be removed into this court. It may be
 said, however, that does not amount to an authority,
because the action does not go on; the reason of that is,
that in this court an action of ejectment will not lie
against the Crown. The party must proceed by a peti-
tion of right. In an action of ejectment we remove it,
although we thereby actually extinguish the action."
 In the same case Baron Platt says, "It has been said
 that in cases of ejectment the Crown has not been
 allowed to carry on the proceedings in this court. Is
 there not a very plain answer to that, viz., *that it is the*
prerogative of the Crown not to be sued by writ? and
 it would be one of the most absurd proceedings in the
 world for the Crown to command itself. *It is the*
prerogative of the Crown not to be sued by writ; and
 therefore another proceeding is adopted, called a petition
 of right, upon which, if it is successful, the direction of
 the Crown is 'that right be done.'

Henderson
 v.
 Westover.

Judgment.

It is perfectly obvious, therefore, that prior to the
 statutes in question, the only mode of enforcing such a
 contract against the Crown—if capable of being enforced
 at all—would have been by petition of right. It seems
 more than doubtful that damages could be recovered
 against the Crown in such a mode of procedure. In the
 Baron de Bode's (a) case it was argued, with great
 ability, upon a careful review of all the authorities, that
 a petition of right was not maintainable for the recovery
 of a sum of money claimed either as a debt or by way
 of damages. The point, however, was not decided.
 And in *Viscount Canterbury v. The Attorney-General*, (b)
 where the attempt was made to recover damages for
 a wrongful act alleged to have been committed by the

(a) 8 Q. B. 208.

(b) 1 Phil. 325.

1852. servants of the Crown, Lord *Lyndhurst* pronounced judgment in favor of the Crown upon demurrer to the petition. In the course of the judgment his lordship observed, "No industry has been wanting on the part of the petitioner. The year books, with the abridgments of *Fitzherbert* and *Brooke*, and other authorities, have been carefully searched, and no case has been found to warrant this proceeding. The decisions go back several hundred years, and in the absence of all precedent during so long a period, I think I should not be justified in deciding, for the first time, that such a proceeding can be maintained."

Henderson
v.
Westover.

But however that question may be finally settled, it is not to be doubted, I think, that the plaintiff had no means of enforcing specific performance against the Crown. In *Viner's Abridgment*, Tit. Prerog. (M. b. 7) 1, (a) it is laid down, "That nothing shall pass from the Crown but by matter of record;" but if a decree for specific performance could be pronounced upon the receipts which constitute the plaintiff's title in this case, the whole beneficial interest would have passed in fact without any record. Moreover, proceedings to enforce the specific performance of an agreement for the sale of land presuppose a power to compel that which is the object and end of such proceedings, namely, the execution of a conveyance; but no such power any where exists. In *Hodge v. The Attorney-General*, (b) Baron *Alderson* said, "Here the legal estate is vested in the Crown; and I do not know any process by which this court can compel the Crown to convey the legal estate."

Judgment.

Then, if no interest would have passed from the Crown, under the circumstances of the present case, irrespective of the recent statutes; if the lessor of the plaintiff would have had no means of enforcing specific performance against the Crown, it follows, I think, that

(a) See also *Nurse v. Lord Seymour*, 13 Beav. 254.
(b) 8 Y. & C. 346.

but for those statutes, it would have been competent for the Crown to have conveyed the premises in question to any other purchaser at its pleasure. And if, in the exercise of that right, with a full knowledge of all the circumstances, the Crown had deliberately chosen to issue its letters patent to such purchaser, there is no principle, as it seems to me, upon which they could have been cancelled. To have declared such letters patent void, for personal wrong in the Crown, would have been impossible, because negligence or misconduct, and *a fortiori* fraud, cannot be imputed to the Crown, and, if they occur in fact, the law affords no remedy; (a) and upon the hypothesis, neither fraud nor concealment being imputable to the purchaser, the conveyance, as a necessary consequence, would have been perfectly valid.

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Upon the argument of this appeal the state of the law prior to the recent statutes was not discussed, probably because it was considered too clear for argument; and no case was cited. Under such circumstances it would have been sufficient, perhaps, had I merely cited the case of *Boulton v. Jeffrey*, in appeal, which clearly asserts, I think, all the propositions I desire to establish. The bill in that case was filed in 1839, prior, therefore, to the statute 4th & 5th Victoria, chapter 100. Each party was a purchaser for valuable consideration from the Crown. The plaintiff, in the court below, had petitioned the executive government for leave to purchase. The government, with full knowledge of the adverse claim, had granted such permission. A contract had been signed by the Commissioner of Crown Lands, under which the plaintiff had paid the entire purchase money; but, notwithstanding, letters patent had been issued to the defendant. Under these circumstances the plaintiff filed his bill, charging upon the defendant fraud, actual and constructive, and praying, amongst other things, a

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(a) *Vicount Canterbury v. Attorney-General*, 2 Phil. 221.

1852. declaration that the defendant had become, under the circumstances, a trustee for the plaintiff. In delivering the judgment of this court His Lordship the Chief Justice observed, "It is, so far as we know, quite a novel attempt that is made by this bill, to establish that the grantee of the Crown, holding under letters patent, may be declared by a court of equity to be but a trustee for another person, whom they may invest by the decree with the beneficial ownership of the estate, by reason of an equity which they may consider to have been acquired while the land was yet vested in the Crown, and this when the grantee of the Crown is not charged with having done or intended any thing wrong in obtaining the grant, but is admitted to have merely urged his claim to a patent on the footing of right, *and when the government, exercising its judgment and discretion on full knowledge of all the circumstances, deliberately directed the patent to issue to the appellant;*

Judgment. *thus disallowing the claim to a grant which had been advanced by the other party; in other words, that a court of equity may, upon its view of the claims of the parties on which the Crown has decided, overrule the act of the Crown, and defeat the title of the patentee, either partially, as in this case, or wholly, as might on the same principle be done in other cases.*" And again, "we agreed however with the argument of Mr. Esten, that even if it could be charged that the patent had issued improvidently, or that the Crown had been in any manner misled, the consequence of that could in general only be, that upon a proper proceeding by the Crown, at the instance (it might be) of the person shewing himself to be prejudiced by it, the grant should be repealed, and thus the land would be again vested in the Crown, *which unquestionably must be allowed to exercise its will in disposing of its property. There would even then be no obligation upon the Crown to issue letters patent to the plaintiff in this case; an obligation, however, which the decree in effect imposes, and by anticipation enforces, by transferring the owner-*

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ship to a person to whom the Crown had expressly declined to grant the land." 1852.

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I shall have occasion to refer to this case again; but I may remark here, that the reasoning throughout the judgment, as I apprehend it, is quite irreconcilable with the notion of a right to enforce specific performance against the Crown. Several of its propositions are quite inconsistent with such a right. Had it existed, it would not have been true "*that the Crown must unquestionably be allowed to exercise its will in disposing of its property,*" because there would have been, then, "*an obligation upon the Crown to issue letters patent*" to the party entitled to specific performance. And, under such circumstances, the patentee, with notice of a prior contract, would, upon the ordinary equity, have been a trustee for the first purchaser; all of which I take to be clearly negatived by this judgment.

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The same doctrine is implied, I think, in his Lordship's judgment in the present case, when he remarks, "*The statutes have, to a considerable extent, interfered with the control which might always have been exercised before, so long as the patent had not been granted.*"

Turning, then, to the statutes, the 18th section of the 4th and 5th Victoria, chapter 100, upon which the question turns, after regulating the form of receipts to be given to the purchasers of crown lands, providing "*that such receipt shall bear date on the day on which it is actually signed, and shall authorize the purchaser to take immediate possession of the lot so sold, and to maintain actions or suits in law or equity, against any wrongful possessor or trespasser on such land, as fully and effectually as if the patent deed had issued on the day of the date of such receipt.*" The corresponding passage in the 17th section of the previous act, 7th Wm. IV., chapter 118, differs in this, that it enables the purchaser to maintain actions of ejectment or for

1852. trespass against any wrongful possessor or trespasser." It is contended, on behalf of the plaintiff, that the receipt furnished here by the district agent, in pursuance of the above clause, entitles him to maintain ejectment against the Crown, or any party in possession for or under the Crown, not holding a prior receipt.

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Now, reading this clause by itself, without reference to the general object and purview of the statutes, I am wholly unable to reconcile the construction contended for with the express language of the legislature. Assuredly the right to maintain actions of ejectment and trespass against "*wrongful possessors and trespassers*," is something substantially different from a right to maintain such actions against the owner of the freehold. Such rights of action are familiar in our law. Bare possession, ordinarily speaking, oftentimes wrongful possession, is sufficient to maintain trespass against a wrong-doer. (a) Even an intruder upon the Crown may, it would seem, maintain trespass against a wrong-doer. (b) This clause, therefore, in authorizing such actions against "*wrongful possessors and trespassers*," so far from warranting, appears to me very clearly to negative, any such right against the Crown. That such right of action should have been vested in purchasers of crown lands against wrong-doers was highly reasonable and expedient; but that they should have been armed with such power against the Crown, and that, too, upon payment of a single instalment, seems to me so highly unreasonable, that nothing short of the most express language would warrant us in concluding such to have been the intention of the legislature. But the clause in question not only admits the construction contended for by the defendant, but admits it, as it seems to me, much more naturally than that suggested on the other side.

It is an established rule, I apprehend, in the construc-

(a) Chambers v. Donaldson, 11 East, 65.

(b) Harper v. Charlesworth, 4 B. & C. 574.

tion of statutes, that a "power derogatory to private property must be construed strictly, and not enlarged by intendment. (a) Now, apart altogether from prerogative, viewed as a question between subject and subject, it is not to be doubted that the construction placed upon these statutes derogates, in a most material manner, from the rights of private property. A contract like the present, between subject and subject, would not confer upon the vendee any right to maintain ejectment against his vendor. The latter would be entitled, unquestionably, to retain possession until the execution of the conveyance; and, should the contract provide for the interim possession of the vendee, any breach on his part would, as a general rule, revive the legal right of the vendor, and entitle him to maintain ejectment without notice. (b) But, upon the construction contended for, the production of a bare receipt would entitle a vendee to recover possession against the party having the legal estate, and that in a court of law where, of course, the equitable title of the plaintiff can neither be inquired into nor determined. Thus the equitable title would be permitted to prevail at law, while it would, perhaps, wholly fail in the proper tribunal.

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But this construction becomes still more objectionable when we consider the statute in question as affecting the rights of the Crown. In *Magdalene College* case it was resolved "*that where the King has any prerogative, estate, right, title, or interest, by the general words of an act, he shall not be barred of them.*" The King has a prerogative, *quod nullum tempus occurrit Regi*, and, therefore, the general acts of limitation, or of plenary, should not extend to him; so the King, by his prerogative, may sue in what court he pleases, and of this prerogative he is not barred by the general provision of the act of *Magna Charta*, cap. 11 et sic de cæteris." (c)

(a) Loftt. 438.

(b) *Doe Tomes v. Chamberlaine*, 5 M. & W. 14; *Winterbottom v. Ingham*, 7 Q. B. 611.

(c) 11 Co. 76a.

1852. Now if, prior to these statutes, the title of the Crown could not have been tried in an action of ejectment, but only by petition of right; if specific performance of a contract like the present could not have been enforced against the Crown, and if, as a necessary consequence, the Crown must have been allowed to exercise its will in the disposal of its property, notwithstanding such contract; if letters patent, issued to a second purchaser, with a full knowledge on the part of the Crown of all the circumstances, would have been valid and effectual; then it seems to me, with great deference, that the construction placed upon the clause *does in fact bar the prerogative, estate, right, title, and interest of the Crown*, not under the general words of an act of parliament merely, but contrary to their natural signification.

Judgment. Upon the argument, indeed, it was not contended broadly that the plaintiff could have succeeded either against the Crown, or against a party in possession under letters patent. But that seems to me to be the necessary conclusion from the premises. If the Crown be bound by the contract, then, no doubt, means must exist of enforcing it; and, if a second contract of sale would be void, the patent issued in pursuance of that contract would be also void, and consequently ineffectual, against the possessory right conferred by the statute. This consequence, however, was not admitted, but it was argued that the plaintiff must recover here, at all events, inasmuch as no interest can pass from the Crown except by matter of record, and as the defendant does not claim by matter of record, he must consequently be regarded as a wrong-doer. But if the Crown be not bound by the contract, and had, consequently, a right to re-sell; or if, whether bound by the contract or not, the Crown be entitled to retain possession until the issue of letters patent; then the possession of the Crown during that period must be, of course, rightful, and if the possession of the Crown be rightful, then those in by permission, and with the sanction of the Crown, can

not be "wrongful possessors." This was in effect decided by the Court of Queen's Bench, in *Harper v. Charlesworth*. (c) It was contended there, as here, that no interest could pass from the Crown except by matter of record, and that the plaintiff must, therefore, be regarded as a wrong-doer, and so disentitled to maintain that action. In answer to that argument Mr Justice Bayley, in delivering the judgment of the court observed, "There is a material distinction between what is essential to be done to convey a title from the Crown, so as to take away its right, and what is necessary to be done to confer a privilege, so as to prevent a party exercising that privilege from being a wrong-doer. A title to Crown land can only be acquired by matter of record, but the Crown may, by parol, confer privileges so as to take away from itself the power of treating the party exercising the privilege as a wrong-doer." Here the Crown, asserting title to the premises in question, placed the defendant in possession, and when this ejectionment was brought, her Majesty's Attorney-General was directed, by an order in council, to take steps to resist the action. The defendant's possession, therefore, was the possession of the Crown. Now, prior to the statutes we have been considering, the title of the Crown could not have been tried in an action of ejectionment, and as there is nothing in them to bar her Majesty's prerogative, this action, in my opinion, ought not to have been tried; but being tried, the possession of the defendant was, I think, the possession of the Crown, and that being rightful, the verdict should have been for the defendant.

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It is argued, however, that the 3rd section of the statute 12th Victoria, chapter 31, negatives by implication the construction contended for by the defendant. That clause provides, "That location tickets, or licenses of occupation for Crown or other public lands, given by the Commissioner of Crown Lands, &c., shall also bear

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Westover. date on the day on which they are actually signed, and shall in like manner authorize the nominees thereof to take immediate possession of the lot or lots therein described, *and so long as the said location ticket or license of occupation be not revoked by an order in council*, to maintain suits in law or equity, &c." Upon this clause it is contended that as the legislature was careful to secure to the Crown a power of revocation, in relation to location tickets and licenses of occupation, but did not reserve it in relation to sales, they must be considered as having impliedly negatived such a power in the latter case.

If it be true that the "prerogative, estate, right, title, and interest of the Crown" can not be barred by the general words of an act of Parliament, then it follows that the conclusion attempted to be drawn from this clause can not be maintained.

Judgment.

But, irrespective of that consideration, the inference suggested to my mind by this clause is directly opposite to the one which had been drawn from it. Had the legislature, indeed, *reserved* to the Crown a right of revocation in relation to location tickets, and omitted to make such reservation in relation to sales, there would have been strong ground for the argument. But this clause does not in fact "reserve to the Crown a power of revocation." It speaks of such a power as a thing known and admitted, but does not reserve it.

The same observation arises on the 9th clause of the same statute, which not only presupposes a power of re-sale to be vested in the Crown, but declares it *to be the duty of the Commissioner of Crown Lands*, with the sanction of his Excellency in Council, to proceed to a re-sale upon default.

The 29th section of the statute 4th and 5th Victoria, chapter 100, appears to me to have an important bearing

in determining the true construction of these statutes. Had the legislature intended to make sales conclusive as against the Crown, prior to the issue of letters patent, they would have provided, I think, means of enforcing such contracts; and a mode of cancelling such contracts, when tainted with fraud, would have been also provided. But the clause to which I have referred gives no jurisdiction to decree the issue of letters patent. It empowers the court, indeed, to decree letters patent issued "*through fraud, or in error or mistake*," to be void, and provides that upon the registration of such decrees, such letters patent shall be deemed void to all intents; but the Crown would be thus freed, and no power to cancel fraudulent contracts is conferred.

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I had purposed, in conclusion, to have adverted to the great inconvenience likely to result from the construction adopted by the court of Queen's Bench, but as his Lordship the Chief Justice has already done that in *Boulton v. Jeffrey*, in language much more forcible and just than any which I could select, I shall content myself with citing a passage from the judgment in that case.

Judgment.

"It is difficult to conceive a more prolific source of litigation than would be opened in this province, if the patentee of the Crown were exposed to be attacked upon supposed equities acquired by other parties while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment, is imputed to the patentee, and when the Crown, at the time of making the grant, had exercised its discretion on a view of all the circumstances. Just such a patent as this lies at the root of every man's title; thousands of them have been issuing annually for nearly fifty years. It is impossible to tell in how many cases there may have been conflicting pretensions which it has thrown upon the government to decide upon; in some, no doubt, it has not been in their power to grant to either one or

1862. *Henderson v. Westover.* more contending parties, without leaving some hardships to be borne by the other; the utmost care could not have avoided this in the infinite number of such transactions. The mistakes of parties, as well as of public officers, and misapprehensions of various kinds, have given rise to opposing claims, which called for anxious deliberation in the executive government, and all that could be done at last was to grant to the party which seemed to be best entitled. *Now, if it really could be held that after such determination of the government, and after the letters patent had been issued by their order, the very party whose claims had been considered and overruled by them, could defeat the whole effect of their grant, by obtaining a decree in Chancery declaring that the patentee of the Crown held only in trust for him; it is easy to conceive the infinite vexation this would lead to, and the anxiety which must follow."*

Judgment. Upon all these grounds I am of opinion that the order appealed from should be reversed.

MACAULAY, C. J., C. P.—The question raised is a general one; whether it is competent to his Excellency the Governor-General, in Council, to cancel or rescind the sale of clergy lands, as a matter of prerogative right, or executive discretion, without any reason, or without reasons sufficient, to invalidate it in law.

It depends upon the construction to be placed on the statute 4th and 5th Victoria, chapter 100, section 18; in doing which it is said to be a useful rule to adhere to the ordinary meaning of the words used, and to the grammatical construction.

The provincial statute 7th Wm. IV., chapter 2, section 2, conferred jurisdiction on the Court of Chancery, "*to decree the issue of letters patent from the Crown to rightful claimants,*" and to institute proceedings for the repeal of letters patent, erroneously or improvidently

issued," and by statute 4th and 5th Victoria, chapter 100, section 29, "In all cases wherein patents for lands have or shall have issued through fraud, or in error, or mistake, to decree the same void." 1852.

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Statute 7th Wm. IV., chapter 118, section 17, after providing for the payment of the purchase money to the resident agent, and that upon the receipt of such purchase money, such agent should give a receipt for the same, &c., enacted that the receipt so given should authorize the purchaser to take immediate possession of the lot so sold, and to maintain actions of ejectment, or for trespass against any wrongful possessor or trespasser thereon, in his own name, as fully and effectually as if the patent deed had been issued to such purchaser; and section 26 of this act, and section 25 of 4th and 5th Victoria, chapter 100, authorize private sales of public lands to lessees or occupants, &c., who would be liable to injury by the disposal thereof to any other person; and by the Imperial Act 3rd and 4th Victoria, chapter 78, the sale of clergy reserves is authorized. Judgment.

The Provincial Statute 12th Victoria, chapter 31, section 2, extended the 4th and 5th Victoria, chapter 100, section 18, to clergy reserves. That section, after directing the payment of purchase money to district agents, enacted that such agents, upon the receipt of any purchase moneys, should give the purchaser a receipt for the same, specifying therein the number of the lot, or the land purchased, or otherwise sufficiently describing the same, "and such receipt shall bear date on the day on which it is actually signed, and shall authorize the purchaser to take immediate possession of the lot to be sold, and to maintain actions and suits in law or equity against any *wrongful possessor or trespasser* on such land, as fully and effectually as if the patent deed had issued on the day of the date of such receipt;" and at the end of this section, "whether such receipt be for partial payments, or in full payment of the land."

1852. The 12th Victoria, chapter 31, section 3, extends
Henderson similar provisions to location tickets, and licenses of
v. occupation, for Crown or other public lands, *so long as*
Westover. *the same be not revoked by an order in Council.*

Section 7 authorizes the cancellation of erroneous patents in certain cases, *where there is no adverse claim.*

Sections 9, 10, and 11, provide for re-sales, in default of payment by purchasers.

Statute 4th and 5th Victoria, chapter 100, section 14, provides for ascertaining the price of lands; and sections 15 and 24 for the appointment of agents for their sale.

Section 19 provides for the issue of Letters Patent upon full payment, &c.

Judgment. 14th and 15th Victoria, chapter 56, extended the time limited by 12th Victoria, chapter 31, section 3, and made further provisions on the subject.

Harper v. Charlesworth, (a) decides that a person who occupies under a parol license from the Crown is not an intruder. This case also seems to shew that a legal right may be acquired under a statute, without patent under the great seal; and I would imagine the statute here imparts a legal right sufficient to support ejectment. *Doe ex dem. Watt v. Morris*, (b)

In 4 Bac. Abr. 212, it is said that when the King's grants are upon a valuable consideration, they shall be construed favorably for the patentee, for the honor of the King.

See also Com. Dig., grant by the King; Com. Dig. patent, F. 1, 2, 3, 4; *Ex parte O'Reilly*. (c)

(a) 4 B. & C. 574; S. C., 6 D. & R. 572.

(b) 2 B. N. C. 189; See also 14 M. & W. 300; 15 M. & W. 97; 1 Ex. R. 211; Plow. 547.

(c) 1 Ves. Jur. 112.

The statute 4th and 5th Victoria, chapter 100, section 18, enacts two things in relation to the present question.

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1st. That the receipt of the Government or Crown agent shall *authorize* the purchaser to take immediate possession of the lot sold, and

2nd. To maintain actions or suits in law or in equity against any wrongful possessor or trespasser, on such lands, as fully and effectually as if the patent deed had issued on the day of the date of such receipt.

The last passage applies equally to each of the above provisions, and it appears to me that the statute operates upon the receipt, so as together to confer a legal right to the possession on the vendee, not only as against wrongful possessors or trespassers, but as against the Crown. If the receipt authorizes the purchaser to take immediate possession of the lot sold, as fully and effectually as if the patent deed had issued on the day of the date of such receipt, it may be supposed that a patent had issued, acknowledging the payment of the whole, or part of the purchase money, according to the import of the receipt, and *authorizing* the purchaser to take immediate possession of the land, subject to determining, in the event of his failing to fulfil his contract. In such an event the vendee would acquire a vested legal right to the possession, and in either case, if vacant, he could of course enter without being an intruder upon the Queen's land, or if pre-occupied, or afterwards occupied by any one intruding or entering wrongfully, he might maintain ejectment.

Judgment.

The legal right to the possession, derived under the statute, is of course only conditional or *sub modo*, that is, to subsist so long as he fulfilled his contract; for if he broke it, or failed to perform the same, as by default in the payment of future instalments, his right to continue in possession would cease, that is, as against the Crown,

1852. by analogy to the ordinary cases of vendor and vendee, where the purchaser is allowed to enter and enjoy until he make default, &c.

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To be sure the statute gives no higher or other legal estate than a right to enter, occupy, and enjoy, until default, &c., but on such a title ejectment is maintainable against wrong-doers, &c., and if the purchaser duly made all his payments, I suppose a patent in fee might be obtained through the Court of Chancery, under the 7th Wm. IV., chapter 2, section 2, or if not, it ought to be issued according to the 4th and 5th Victoria, chapter 100, section 19.

Judgment. I think, therefore, that the lessor of the plaintiff acquired a legal right and interest in and to the possession, by virtue of the receipt and statute, and that on the day of the demise, the defendant was a wrongful possessor, and that the Governor in Council could not, by a mere order, afterwards cancel the sale and rescind the right so obtained. I doubt not the sale and right might be defeated under supposed circumstances, but then, I think, the circumstances must be sufficient in law to invalidate the sale and destroy the legal right.

A patent may be repealed or refused in Chancery, if the facts and circumstances warrant it, but then they must be such as warrant it. It is not a matter of course, or of prerogative right, that it should be refused, if resisted on behalf of the Crown. So here I do not think it a matter of course, or prerogative right, that the Governor in Council can, by mere discretionary order, destroy the legal rights of purchasers of Crown lands acquiring a right under the statutes.

The question really is, whether the Governor and Council possess an arbitrary discretion to cancel sales of Crown lands, as they may of locations for free grants. The act itself points to the distinction, and the careful

provisions for protecting purchasers therein contained, 1852.
imply that a sale was intended to confer a vested right, Henderson
that could only be destroyed on sufficient grounds, or by v. Wainlover.
a special proceeding. It is not contended that the facts
in this case shewed any fraud in the lessor of the
plaintiff, or that the Queen was deceived, so that the
defendant had any paramount right or protection under
the statute, or the regulations adopted in relation to
intruders of more than five years standing, &c. If the
facts are sufficient, the cases should be rested on them; if
not, it becomes a mere abstract question of prerogative
right and discretion, without regard to the reasons that
may exist, or the motives or inducements that may
operate. I do not think the statute intended to leave
purchasers, who had paid their purchase money and
fulfilled their contracts with the government, and
against whom nothing sufficient to invalidate their
purchases was or could be urged, to the unrestricted
discretion of the Governor and Council; but that when Judgment.
a pecuniary consideration was paid as the price of the
land, legal and equitable rights were acquired as against
the Crown, that could only be afterwards defeated on
sufficient grounds. What facts might or might not
constitute adequate grounds, would always form a ques-
tion, in the particular instance, for the consideration of
the court of law or equity, in which the transaction
might be impeached.

In the present instance the facts are not relied upon
as sufficient to defeat a legal right, if such right is con-
sidered to have vested.

I think a legal right to enter and possess did vest by
force of the statute, and that nothing appears sufficient
to determine it.

If the discretion contended for was intended to be
reposed in the executive government, a declaratory act
to that effect seems to me the best mode of establishing

1852. it. As to the expediency of preferring squatters or intruders to strangers, the statutes, both Imperial and Provincial, shew, that after such persons have possession and improved the lands for a series of years, it is deemed just, and I am far from entertaining any contrary sentiment on that subject. I have always felt the weight of argument to be in favor of protection being extended to persons who have entered (though without authority) and improved Crown lands afterwards offered for sale at fixed prices, as if uncultivated lands, and irrespective of improvements. *Doe ex dem Legh v. Roe*, (a) shews that ejectment does not lie against the Crown. *Attorney-General v. Hallett*. (b)

Judgment. I do not consider the Queen in possession and defending such possession through the defendant, but that the defendant is in possession, claiming to be entitled thereto, by force and virtue of the statutes 4th and 5th Victoria, chapter 100, section 18; and 12th Victoria, chapter 31, section 2, as a purchaser under the Crown. He is not merely in charge for the Crown as a Queen's servant, officer, or agent; if he was, *i. e.*, if the Queen was in actual possession, and the defendant only in charge as a public officer, the above cases shew that a petition of right, and not ejectment, is the proper remedy. They also shew that if the defendant is in possession, claiming right thereto under the Crown, ejectment may be brought against him. If no one had been in possession, and the lessor of the plaintiff had entered, or if he obtains possession in this action, I do not think him liable to be treated as an intruder, or that he can be ousted in an ejectment upon the demise of the Queen, unless something shall be shewn sufficient in law to put an end to his purchase, and thereby to determine the legal right, which it appears to me he acquired under the statute, and which, so far as I see at present, he still holds, however hard it may be upon the defendant.

(a) 8 M. & W. 579-581.

(b) 15 M. & W. 97.

If my view be correct, it should follow that if the Queen was in possession, so that the lessor of the plaintiff could not bring an ejectment, his remedy would be by a petition of right, as legally entitled to the possession—*Chitty's Prerog.* 241, *Stamford's Prerog.* 726. And if such a petition were necessary to be resorted to in the present instance, I do not see how any other result could follow except that of *amoveas manus*.

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It does not appear that the defendant was within the regulations made under the Imperial Statute 3rd and 4th Victoria, chapter 78, or that the Queen was deceived in the sale to the lessor of the plaintiff. If the government inspection reported the defendant's occupation, it was known to the government; if not, and if (as alleged) the defendant applied to the government agent within the year after the land was offered for sale, to purchase, although not strictly entitled to pre-emption under the regulations then in force, the agent knew whatever facts he was informed of. There is no evidence that the lessor of the plaintiff knew of the defendant's possession or improvements, or that he concealed or misrepresented any thing. Judgment.

If the facts brought the case within the principle of the Queen being deceived in the sale, I doubt not the Governor and Council might repudiate it, but I do not find that they amount to this.

My opinion therefore rests upon the ground that the facts do not, in law, amount to a case entitling her Majesty or the Governor in Council to cancel the sale; if they did, the defence ought to prevail.

I have not overlooked the objection that no defined legal estate or interest beyond a mere occupancy at will can be intended as against the Crown, for the statute does not expressly say that the authority to

1852. take possession is to operate at all against the Queen,
 Henderson and cannot be extended in construction.

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Judgment.

It appears to me that an authority to take possession by virtue of a statute passed for such an object, as fully as if a patent had issued, is equivalent in force to Letters Patent conferring such authority by the Queen, and that authority to take possession is equivalent to a demise, or imparts a legal interest co-extensive with the *authority*. (a) The interest thus imparted is not defined. My impression is that it must be construed according to the scope, object, and manifest intent of the statute, just as if expressed, and that is, that such *authority* was to endure irrevocably so long as he fulfilled his contract; but that upon breach thereof it would be revocable, the *authority* being in the nature of the transaction only conditional, like the private authority of a similar kind between subject and subject, when the terms of the agreement are fully expressed in writing. But after the contract of purchase is fulfilled, or until it is broken by the purchaser, my views lead to the conclusion that he is authorized to take and retain possession, and cannot be legally ousted. Whether such right or interest could be devised, or would descend to his heir at law, or would determine with his life, are questions not necessary to be now decided. I look upon it as an unqualified authority or right to enter and possess conditionally, but without limitation, so long as he lived, unless a breach of the condition enabled the Crown to determine the right or authority to occupy and enjoy.

It is no doubt a nice point, involving considerations of prerogative right; yet I cannot construe the act as merely authorizing possession and actions against strangers wrongfully in possession, or trespassing, but think that the right to bring actions at law or equity against such persons, is additional, in aid and corroboration.

(a) Warner v. Browne, 8 East. 165.

ation of the general right to possession conferred by the preceding part of the clause. I look upon that clause as substantive, and independently operative, and sufficient to confer a vested legal interest in and to the possession, so long as the contract of sale legally subsists, as I think it does until legally determined.

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I do not lay stress upon inconvenience one way or the other. It may at times be very expedient that the uncontrolled power to rescind or alter sales should repose in the executive government; so on the other, it may be thought inexpedient that all purchasers of Crown lands should be remediless as against the Crown, and merely hold at sufferance, although they may have paid their money, made large improvements, or entered into contracts or incurred obligations to others. I can not think the legislature so intended, but that it was the design of the act to confer vested rights on purchasers, liable to be defeated only under circumstances such as would be sufficient to avoid letters patent conferring a similar right.

Judgment.

If such was not the intention, I am unable to perceive it on the face of the statutes, and an explanatory or declaratory act (limiting the extensive operation of the principle and construction contended for) would, I am disposed to think, be the appropriate remedy, unless indeed our decision shall be reversed upon appeal to the Queen in Privy Council, and a contrary rule be thereby established.

It is not a term for years, or in fee, or for life, but it is the case of a vendee entitled to possession by the terms of his purchase.

Under all the facts appearing in this case, I am of opinion the appeal should be dismissed with costs.

ESTEN, V. C.—The facts of this case, as I understand them, are, that the plaintiff, *Henderson*, purchased the

1852. lands in question, being a clergy reserve, of the government, paid one instalment of his purchase money, and obtained a receipt for it from the proper officer, and that afterwards the government passed a minute in Council, rescinding the sale, directing Mr. *Henderson's* purchase money, which he had paid, to be restored to him, and authorising a purchase of the same lands by the defendant, *Westover*, who thereupon entered into a contract with the government for that purpose, paid part of his purchase money, obtained the usual receipt, and thenceforth continued in the possession, which he had previously for some time held of the property, with the consent, and by the authority of the government. Subsequently to this second sale, and while *Westover* was in possession, with the sanction and permission of the government, *Hendersqn* commenced the action which forms the subject of this appeal, and the question which we have to consider is, whether such an action is,
Judgment. under the circumstances of this case, maintainable.

As no patent had issued granting the lands in question, it is obvious that this action could not be maintained irrespectively of certain acts of parliament, passed for the purpose of regulating the disposal of the public lands of the province, within which the lands called "Clergy Reserves" have been included; and by one of which, namely, the 4th and 5th Victoria, chapter 100, to which it is sufficient for my purpose to advert, it is provided in its 18th section that whensoever a purchaser shall have paid an instalment of his purchase-money, and obtained the proper officer's receipt, he shall be authorized to take possession of the lands which he had purchased, and to maintain actions for the recovery of such possession against all wrongful possessors and trespassers.

I have already observed that in the present case, independently of the provision in question, this action could not be maintained. The right to maintain it

depends entirely on the operation of this clause. Now, 1852.
 without entering into the question how far the Crown
 is bound by its contracts, to what extent it has power to
 rescind them, or what means exist of enforcing them
 against the Crown, and without dwelling on the various
 considerations which are involved in the discussion of this
 question, it is sufficient for me to observe that, in my judgment,
 the clause in question, by virtue of which alone this
 action is sought to be maintained, was not intended to
 apply to a case like the present; that it comprehends
 only cases arising between recognised purchasers from,
 and claimants under the Crown, and third persons, who
 are wrongful possessors and trespassers, both as regards
 such purchasers and claimants, and the Crown itself,
 and does not authorize any person, having contracted
 with and obtained a receipt from the authorized agent
 of the Crown, to dispossess either the Crown itself, or
 any persons holding possession of lands by its authority
 and with its permission, and that upon the Attorney- Judgment.
 General appearing under such circumstances, and
 announcing that the defendant in the action is in
 possession with the sanction and by the consent of the
 Crown, and that, consequently, the action is in fact
 brought against the Crown itself, proceedings in it
 ought to be stayed. I consider that the facts upon
 which I base my judgment in this case sufficiently
 appear, and therefore I think, with the greatest respect
 for the contrary opinion, that the judgment of the court
 below ought to be reversed.

SPRAGGE, V. C.—After the best consideration that I
 have been able to give to the question involved in this
 suit, I can come to no other conclusion than that eject-
 ment is not maintainable against the appellant, the
 defendant in the court below. In the view taken by his
 Lordship, the Chancellor, I agree fully, and in the
 reasoning by which it is supported.

Looking at the enactments of the legislature from

1852. 1837 to 1849, in relation to the disposal of the public lands, one obvious intent and object pervades them all, viz., to facilitate the dealing of the Crown with occupants and other purchasers of Crown lands; there is not one provision from which the *intent* can fairly be gathered to cripple the authority of the Crown, to abridge the exercise of its discretion, or to confer rights adverse to the Crown, upon those with whom the Crown should have to deal.

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This consideration is material; for the rights of the Crown are not affected by intendment or inference, and the Crown, in giving the royal assent to an act for the more convenient exercise of what were before its undoubted rights, in relation to a particular matter, is not, I apprehend, to be taken as waiving any of those rights, unless they are waived expressly, or unless it very clearly appears that such was the intent of the act.

Judgment. The section of the act under which this action is brought is highly useful, and would answer all the ends for which it is evidently intended, without at all abridging the discretionary power of the Crown to deal as it might deem just with the public lands. The construction given to it is not the necessary construction, nor, as I humbly conceive, the proper one. It is evident that the discretionary power of the Crown was intended to be retained. The Crown had to deal with lessees and other occupants, as well as with new purchasers; and the claims of lessees, occupants, and other individuals who, from the peculiar situation of property, would be liable to injury if it were disposed of to any other persons, are plainly recognised in the 25th section of the act of 1841; and again, in the 28th section of the same act, the exercise of the discretion of the Crown is recognised in dealing with, *inter alia*, "cases of sales or appropriations of land inconsistent with each other, for the same land."

It is said that in disposing of the public lands by

sale, the position of the Crown is changed from what it was before; that the Crown has become a vendor, and that the Crown and the purchaser have become contracting parties; but where is the contract? and by what process or act is the Crown placed in such a position? Does the purchaser acquire any rights other than such as are expressly conferred upon him by the statute? The statutes do not place him upon the footing of a contracting party; nor is it a necessary consequence of the position in which the statutes do place him, that he should have the rights of a contracting party, unless, or any further than, they are expressly given by the statute. An ordinary purchaser would have the right to enforce from his vendor specific performance of the contract to sell. Here there is, as I conceive, strictly no contract to sell, and if there were, it has not been contended that it could be enforced against the Crown, and a petition of right would not, I apprehend, lie for such a purpose. What is sought here is virtually an ejectment against the Crown. Now unless a right to such suit is conferred by statute, no such right exists.

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Judgment.

The statute gives the right to the holder of such receipt to take immediate possession of the land sold, and to maintain actions and suits in law or equity *against any wrongful possessor or trespasser on such land*. The statute confers a bare right, and that against a particular class of persons. The Crown has not parted with its title, has entered into no contract, and retains the land as its own property. The position of the holder of the receipt, as I understand it, is, that he has commenced a process under a statute, by paying certain purchase money, by which, eventually, he may acquire title from the Crown; but in the meantime it does appear to me (with great respect for the opinion of the learned judges from whom I have the misfortune to differ) a great step to hold a person in such a position entitled to treat the agent of the Crown, or person in possession under the immediate authority of the Crown,

1852. as a mere "wrongful possessor or trespasser." These words in the act must have their weight and construction; the sentence in the 18th clause would have been complete without them; evidently they are *restrictive*. The construction given by the court below appears to me necessarily to give an *unrestricted* right of action against all the world, while the statute gave it against wrong-doers only. Now the mischief or inconvenience intended to be remedied evidently was, that under the old law proceedings *at the suit of the Crown* were necessary to punish trespassers, and to put wrongful possessors out of possession, and the provision in the statute placed the remedy in the hands of the intending purchaser from the Crown.

Judgment. To effect such object, the statute appears correctly worded, but there is nothing to shew that it was intended for any other purpose: nothing having a tendency to shew that it was intended to be used *adversely* to the Crown. Its giving a right of action "as fully and effectually as if the patent deed had issued on the day of the date of such receipt," does not affect the construction, as it must still be read with the words of restriction "against any wrongful possessor or trespasser," and the holder of the receipt thus has a right of action against wrong-doers as fully and effectually as if a patent deed had issued. To give to the latter words an unrestricted interpretation, and treat the holder of a receipt as entitled to the same rights as a patentee for all purposes leads, I think, necessarily to this, that the issue of a patent to another person would only place that person in the position of a second grantee of the same land, a position *puisne* to that of the mere holder of a receipt, and that although he may have paid but one instalment, while the patentee had paid the whole of the purchase money.

The right of the Crown to deal with the land until patent issued was recognised in the judgment of the

Court of Appeal of this province in the case of *Boulton v. Jeffrey*, already referred to by the Chancellor. There are some passages in the judgment of his Lordship, the Chief Justice, in that case, which appear to me to be peculiarly applicable to this. Speaking of the patent being repealed upon a proceeding by the Crown, in case the Crown had been deceived or misled, as being the proper course, his lordship says, "*and thus the land would again be vested in the Crown, which, unquestionably, must be allowed to exercise its will in disposing of its property.*" In another passage, speaking of the repeal of the patent, upon a case of imposition being made out, it is said that the Crown would be "left to dispose of its land as it might find to be consistent with justice." There are several other passages in the same judgment which recognise the right of the Crown to exercise its judgment and discretion upon conflicting claims between adverse parties. Among them is the following: "The mistakes of parties, as well as of public officers, and misapprehensions of various kinds, have given rise to opposing claims, which called for anxious deliberation in the executive government, and all that could be done at last was to grant to the party which seemed to be best entitled."

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Judgment.

In the case from which I have quoted, the Crown patent had issued, but the observations of the court were evidently directed to a state of circumstances such as exists in this case, viz., conflicting claims, urged before the government by adverse parties, to become purchasers of the same land. In that case the respective claimants were purchasers under the act of 1837, which contained provisions similar to those under which the lessor of the plaintiff in this case claims. They were not any more than the parties in this case mere recipients of the grace and bounty of the Crown, and the passages which I have cited from the judgment are therefore applicable here. I have quoted them although they are, I believe, among these quoted by the Chancellor, for the sake of

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the weight to which they are justly entitled, and because they express better than I can express them, my own views upon the subject. The parties to this suit appear to have been adverse claimants before the executive government, and in deciding for the defendant the Crown, by its proper officers, doubtless disposed of its land as was felt to be consistent with justice; and here I may add that not only has the Crown, in my judgment, the right, but that it is, as I believe, to the advantage and benefit of purchasers of public lands that the Crown should have, and by its proper officers should, until patent issued, exercise the right of considering and determining upon the conflicting claims which may be preferred by different individuals to the same land. The materials for coming to a sound and just conclusion are within the reach of the government; its officers are conversant with the subject, and there is no reason to believe but that the government would, between adverse claimants, adjudge the land to the one whose claims appeared the more just.

Judgment.

With regard to the position, that the Crown has granted a receipt, and can revoke it by no act less than a matter of record, I think it is fallacious. The Crown *can* manifest its will as to its disposition of Crown lands otherwise than by matter of record, and authority has been cited to shew this; and besides, here there is, as it appears to me, no revocation properly so called. There has been, between conflicting claims, a preference for that one which appeared the more just, and the Crown has declared that preference in the ordinary mode, and that claimant, thenceforth, held possession under the immediate authority of the Crown. Such act of the Crown may have affected, and as I think did affect, the position and rights of the other claimant, but the Crown had granted nothing which it was necessary to revoke. Its agent had received money, and given a receipt for it, and to that receipt a certain effect is given by statute against wrong-doers. If the

Crown, in the exercise of its judgment and discretion, place another person, whom it conceives better entitled, in possession, or by its deliberate act recognises his possession as not wrongful, but lawful, the effect of such act of the Crown is to invest the character of such possession with right, and thus take the person in possession out of the class against which the holder of such a receipt has his remedy by ejectment. This, I think, is the extent of the act of the Crown, when it allows the claim of another than the holder of the receipt, and it is not, as I conceive, a revocation of any thing, in the strict and proper meaning of that term.

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Judgment.

I should have felt it right to go more fully and minutely into the question raised in this cause, if I had not been preceded by his Lordship the Chancellor and my brother *Esten*; as it is, I have expressed only briefly and generally my views upon the subject.

Per curiam.—Appeal dismissed with costs.—[BLAKE, C., and ESTEN and SPRAGGE, V. CC., dissenting.]

[Before the Hon. Sir John B. Robinson, Bart., C. J., the Hon. W. Hume Blake, Chancellor, the Hon. W. H. Draper, C. J. C. P., the Hon. Sir J. B. Macaulay, the Hon. Mr. Justice McLean, the Hon. Mr. Justice Burns, and the Hon. Vice-Chancellor Spragge.]

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

THE QUEEN V. GRAY.

Application for new trial in criminal cases—Statute 20 Vic., ch. 20.

Held, affirming the judgment of the court of Common Pleas, that under the statute (20 Vic., ch. 61) the court is not empowered to grant a new trial in criminal cases on any ground apart from what was done by either the court or the jury at the trial; such as the alleged discovery of new evidence, or a disappointment in obtaining witnesses.

This was an appeal from the judgment of the court of Common Pleas, refusing a new trial of the defendant.

1859. It appeared that *Samuel Gray* and *Roswell Gates* were indicted together at the winter assizes for the United Counties of York and Peel, for the year 1859, on a charge of highway robbery, with violence, alleged to have been committed on one *James Collingwood*. The prisoners severd at their trial, and *Roswell Gates*, who was tried first, was acquitted; but subsequently, on the trial of the prisoner *Samuel Gray*, the jury returned a verdict of guilty against him, the said *Samuel Gray*, on the whole indictment, and he was sentenced to three years' confinement in the provincial penitentiary, at hard labor.

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In Hilary Term, 1859, an application was made to the court of Common Pleas, for a new trial on behalf of the said *Samuel Gray*, under the provisions of 20 Victoria, chapter 61, on the affidavits of the said *Samuel Gray*, the said *Roswell Gates*, and *Thomas Henry Ince*, filed on the application. The court refused a rule nisi on the affidavits filed, waiving, however, the necessity of filing a copy of the judge's notes of evidence in the cause, as directed by the Orders of this Court, holding that the court is not empowered under 20 Victoria, chapter 61, to grant a new trial on the ground of the absence of witnesses.

From this ruling of the court the prisoner appealed.

Mr. *Ince* for the appeal.

Mr. *J. Patterson* contra.

The judgment of the court was delivered by

SIR J. B. ROBINSON, BART, C. J.—By Statute 20th Victoria, chapter 61, section 1, a defendant in any criminal case convicted at the assizes may apply for a new trial to either of the superior courts of common law upon any point of law, or question of fact, in as full

and ample a manner as any person may apply to such superior court for a new trial in a civil action. 1859.

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Section 4, gives an appeal to the Court of Error and Appeal in case such "conviction shall be affirmed," by the court of common law which has been applied to for a new trial, and it is provided that "such court of Error and Appeal shall and may make such rule or order thereon, either in affirmance of such conviction or for granting a new trial or otherwise, as the justice of the case may require, and shall further make all other necessary rules and orders for carrying such rule, or order into effect."

The last recited words, that the superior court "may make such rule or order thereon either in affirmance of the conviction, or for granting a new trial, or otherwise, as the justice of the case may require," are certainly very comprehensive, but they must be taken in connection with the object of the application which the statute allows to be entertained by the court appealed from; and that is, "an application for a new trial upon any point of law or question of fact." Judgment.

Both of the common law courts have considered that the statute does not admit of a new trial being granted upon affidavits setting forth the discovery of new evidence since the trial, or on the ground that the defendant was unable, from some cause, to procure the testimony of certain witnesses. For the grounds of that opinion I refer to the judgment given in the Common Pleas, which is appealed from in this case, and to the cases in the Queen's Bench of this province, of *Regina v. Crozier*, (a) and *Regina v. Oxentine*, (b) and the case in the Common Pleas of *The Queen v. Beckwith*, (c) in my judgment, is in accordance with the opinion expressed by the Court of Queen's Bench in the cases I have mentioned.

(a) 17 U. C. Q. B. 275. (b) 17 Ib. 295. (c) 8 U. C. C. P. 274.

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In criminal cases, as in civil, it rests with the judge at the trial to determine questions of law, and with the jury to determine questions of fact, though in some cases it is thrown upon the jury to determine a mixed question of law and fact.

Judgment.

The judgment that has been given upon any point of law or question of fact, where it has resulted in the conviction of the defendant, is made by the statute subject to an appeal to either of the superior courts of common law, by way of motion for a new trial, but not, I think, on any ground, apart from what was done by either the court or the jury at the trial; such as the alleged discovery of new evidence or a disappointment in obtaining witnesses.

We all, I think, agree in the opinion that if we could grant a new trial, upon grounds of such a nature as are disclosed in this case, we should certainly not think that a sufficient case of that kind is made out on the affidavits which were before the Court of Common Pleas; and that in a civil case no court would be warranted in disturbing the verdict upon such statements.*

Per Curiam.—Appeal dismissed.

* See also *The Queen v. Mellroy*, 1 U. C. C. P. N. S. 116.

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CROWN LANDS.

(PURCHASE OF.)

Held, on appeal from the judgment of the Court below, that the purchaser from the Government of a clergy reserve, upon which he has paid an instalment of his purchase money, and obtained the usual receipt from the Crown Lands Department, has a right to obtain possession against any one in the occupation; and that although the occupant may have subsequently obtained the receipt of the Commissioner of Crown Lands; the Crown, under such circumstances, being bound by the contract made by the department with the first purchaser. [*Blake, C., Esten and Spragge, V. CC., dissenting.*]

Doe Henderson v. Westover, 465.

DELIVERY OF GOODS.

A party agreed to sell and deliver "F. O. B." 4000 barrels of flour by a day named; of this quantity 3000 had been delivered, but the remaining 1000 were not in the possession of the party contracting to be delivered until after the day appointed. Some days afterwards the vendors sent to the broker who had negotiated the sale the order of another person for the required quantity, which, after taking some days to correspond with their vendees, the purchasers agreed to accept and paid the price agreed upon to the broker, who remitted the money to the vendors, and a vessel was without delay despatched by the purchasers to receive the flour on board: before reaching the port where the flour was to be shipped a fire had taken place in the warehouse and destroyed the flour stored therein. In the absence of any evidence shewing a setting apart of the 1000 barrels, or any acceptance by the purchasers thereof, the Court, while expressing a clear opinion that under such circumstances the loss

must fall upon the vendors, dismissed an appeal from the Court below granting a new trial on the application of the vendors, against whom a verdict had been rendered for the price of the flour; the Court below having ordered such new trial upon the assumption that a certain fact material to the consideration of the point in question was as stated, in which case the verdict would have been wrong; or that such fact was asserted on one side and denied on the other, and the same had not been found one way or the other by the jury: reserving for future consideration the costs of the appeal, thus leaving the new trial to proceed on the terms in which it was ordered.

Coleman v. McDermott, 445.

DEMURRER.

(FOR WANT OF PARTIES.)

See "Practice," 1.

DISTURBANCE.

The church of St. J., having been destroyed by fire, it was agreed that pew-holders who had purchased the right to their pews, subject to a ground rent, should pay a certain sum, and be reinstated as nearly as circumstances would permit in their pews in a new church, to be built on the site of that destroyed. After the new church was built one of such pew-holders refused to pay a sum of £25, agreed to be subscribed by him towards re-building the church, and for which he had given his promissory note; whereupon the churchwardens, acting in pursuance of a resolution of the vestry, removed the door from the pew claimed by him, and the holder thereof instituted an action on the case against the churchwardens for disturbance of his easement. *Held*, affirming the decision of the Court below, that he was not entitled to recover. [*Macaulay*, C.J., and *Burns*, J., dissenting.]

Brunskill v. Harris, 322.

EJECTMENT.

(AGAINST SECOND PURCHASER OF CROWN LANDS.)

See "Crown Lands."

EQUITABLE ASSETS.

H. obtained from his debtor an assignment of his books of account, notes, bills, and other evidences of debt, by way of

security against the consequences of his becoming a party to notes for the accommodation of the debtor; and also a conveyance of real estate from the father of the debtor for the same purpose. Having been compelled to pay a large sum of money by reason of his being a party to such notes, H. recovered judgment against the debtor, and sued out execution thereon, which was the first placed in the hands of the Sheriff, against the debtor, and the effects of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the Sheriff, upon which sale sufficient was realized to pay the execution of H., and leave a balance in the hands of the Sheriff; and H.'s claim was accordingly paid, and the books of account and other securities held by him were delivered up to the debtor, after notice from J., a later judgment creditor, not to part with them, and the father's land was re-conveyed to him. The execution creditor who gave the notice, claimed in consequence, priority over intermediate execution creditors, and also a right to compel H. to make good the amount of his claim in consequence of having parted with the securities. Upon appeal from the Court of Chancery,

Held, 1st, affirming the decree of the Court below, that a subsequent execution creditor had not any equity to compel the first creditor to recover payment of his claim out of the property held by him in security, so as to leave the goods of the debtor to satisfy the subsequent executions; nor had he any right to call upon H. to assign the lands conveyed to him by the debtor's father; nor was H. personally liable to the subsequent execution creditors.

Held, 2ndly, reversing the decision of the Court below, [*Eaten*, and *Spragge*, V. CC., dissenting,] that the securities in the hands of H. being, at that time, not seizable under common law process, no right vested in H. to transfer them to him, nor was he bound to make good to J. any loss sustained by him by reason of his refusal to deliver the securities to J., but that such securities being in the nature of equitable assets, they should be distributed amongst all the creditors *pari passu*. And, per Sir J. B. Robinson, Bart., C.J., that this was not a case to which the principle of marshalling the assets applied, and that H. had a perfect right to restore the securities to the debtor.

Topping v. Joseph, 292.

EQUITY OF REDEMPTION.

(SALE OF UNDER FL. FA.)

Held, by all the Court, that an equity of redemption of an estate of inheritance cannot be sold by the Sheriff under common law process.

Simpson v. Smyth, 9.

[But see Cons. Stat. U. C. ch. 90, sec. 11.]

EVIDENCE.

One of several defendants having deposed to a fact, which, if proved by proper testimony, would have tended to defeat the suit as against him as well as against his co-defendants, *quære*, whether his evidence is admissible on behalf of his co-defendants?

Simpson v. Smyth, 9.

See also "Maker and Indorser."

FIERI FACIAS.

(SALE OF EQUITY OF REDEMPTION UNDER.)

See "Equity of Redemption."

FREE ON BOARD.

The effect and meaning of the words "Free on Board" considered.

Coleman v. McDermott, 445.

GRANT FROM THE CROWN.

1. Where the Executive Government have examined into and considered the claims of opposing parties to lands leased from the Crown, with a claim of pre-emption, and have ultimately granted them to one of those parties, the Court of Chancery has not any authority, where no fraud appears in obtaining the grant, afterwards to declare the grantee of the Crown a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein. And *quære*, if even there had been fraud, whether the Court, under such circumstances, would have authority to interfere at the instance of the party who had opposed the grant.

Boulton v. Jeffrey, 111.

2. The Crown, by a patent in 1838, granted a parcel of land as containing 70 acres, being the easterly half of lot No. 30 in the 7th concession of the township of Albion; the metes and bounds being given as commencing at the south-east angle of the rear or east half of the lot, (such point being known and undisputed, and the Crown at the time owning all the land in that concession beyond that lot,) then on a course north 45° 45' west 10 chains, *more or less*, to the allowance for road on the northern boundary of the township, (which was also well known and ascertained,) then south 74°, west 35 chains 50 links, *more or less*, to

the allowance for road between lots 30 and 31; then south 39° 30', west one chain 50 links, more or less, to the centre of the concession, &c.; and in the year 1850, another grant was made of lot No. 31, in the 7th concession, as containing 34 acres, without any description by metes and bounds. In the original survey of the township the allowance for road between lots 30 and 31 had never been run through, or any posts planted on the rear of the lots, although posts had been planted at the front angles, and by producing the line as it had been run between lots 30 and 31 in the 6th concession, the distance of 35 chains and 50 links, as given by the patent, along the allowance for road on the northerly side of the township, would be materially lessened. The owner of lot 31, treating the person in possession of lot 30, as a trespasser, in respect of all the land not included within such limits, brought an action of trespass against him.

Held, reversing the judgment of the Court below, that the grantee, under the patent of 1838, in the absence of any post to mark the allowance for road, was entitled to the full distance of 35 chains and 50 links, as specified in the grant, without any reference to the posts planted at the front angles of the lot. [*Macaulay, C. J., Esten and Spragge, V. CO.*, dissenting.]

Dixon v. McLaughlin, 370.

3. On the 8th of January, 1836, a surveyor, in compliance with instructions from the Government agent laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then, and had for some time been, in the actual possession of the Episcopal Church, to which body a patent subsequently, and on the 18th of January, 1836, was issued, granting to them all that parcel or tract of land, "on which the Episcopal church now stands, and containing four acres and two-tenths of an acre or thereabouts," upon an indictment for a nuisance in stopping up the highway.

Held, that this survey, although made after the grantees had gone into possession, must prevail against such possession. [*Hagarty, J.*, dissenting.]

Mountjoy v. The Queen, 429.

HIGHWAY.

See "Grant from the Crown," 3.

INDIAN RIGHTS.

See "Rescission of Contract."

INJUNCTION.

See "Mutual Insurance Company."

INSURANCE COMPANY.

(ELECTING TO REBUILD.)

See "Mutual Insurance Company."

JUDGMENT CREDITOR.

See "Equitable Assets."

LEGACIES.

(CUMULATIVE.)

See "Will."

MAKER AND INDORSER.

The effect of the 12 Victoria, chapter 70, commonly called "The Evidence Act," was not to repeal the 5 William IV., chapter 1: where, therefore, the maker and indorser of a promissory note were sued together in one action, and each pleaded a plea setting up want of consideration for making and indorsing the note respectively:

Held, that this did not preclude the one defendant calling and examining his co-defendant to prove the truth of such plea in favour of the party so calling him.

Robertson v. Moffatt, 459.

METES AND BOUNDS,

See "Grant from the Crown," 2.

MORTGAGE.

1. Where a party held a mortgage upon lands, and the mortgagor having afterwards become indebted to the mortgagee in a further sum of money, conveyed the lands to him in fee, and some days afterwards the grantee gave the mortgagor a bond to re-convey upon payment of the whole debt:

Held, that the grantee was entitled to hold the premises as a security for the whole of his debt, as against a mesne incumbrance which had been created thereon between the time of his obtaining the mortgage and the conveyance to him in fee, but of which he had not been notified before the execution of the conveyance under which he claimed. *Held*, also, that registration is not notice in this country.—[Grant's Ch. Rep. vol. 1, p. 169; but see Stat. 13 & 14 Vic., ch. 63, sec. 4; Con. Stats. U. C. p. 894.]

Street v. The Commercial Bank, 246.

2. In November, 1834, the owner of land conveyed the same in fee for the consideration of £159 12s. 6d., with a proviso that if the grantor during his natural life, or his heirs, &c.; in one year after his decease, should pay that sum and interest to the grantee, his heirs, executors, &c., the conveyance and every thing therein contained should be null and void. In August, 1835, the grantor died without having ever paid any portion of the principal or interest, and his representatives had never paid any portion thereof. Some time between 1841 and 1845, the grantee offered the heir-at-law of the grantor to re-convey on payment of principal and interest, then due, (£225,) but which offer he declined to accept, stating that the land was not worth that sum, and subsequently went to reside in the United States, where he died, having some time previously to his death conveyed all his interest in the land to W. M., who died in 1849, without ever having registered his conveyance, or made any claim to the property, or seeking to redeem it. In 1856 the heir of W. M., a minor, filed a bill to redeem against the grantee, and his vendee of the estate, and which the vendee had been in possession of since the time of his purchase, and had cleared seventy acres, and made other improvements to the value of about £600 or £700. On appeal this Court, reversing the decree of the Court below, refused the relief asked, and dismissed the plaintiff's bill with costs.

Stanton v. McKinlay, 265.

MUTUAL INSURANCE COMPANY.

According to one of the conditions in a policy of insurance effected upon a dwelling house, the company in case of loss or damage thereto, were to have the option of making good such loss or damage either in money, according to the sum insured, or by re-building, or by repairing the same, according to circumstances. The house having been destroyed by fire, the company instead of paying the amount insured, elected to re-build, which they commenced doing without having obtained from the insured any plan of the house destroyed, and against his express objec-

tion to their proceeding : in erecting the new structure they also intentionally departed from what was known to be a feature of the old building ; thereupon the insured filed a bill to restrain the company from proceeding to erect the building in the defective manner pointed out, and praying that the company might be decreed specifically to perform the condition by erecting a house exactly, or at least substantially, corresponding with that destroyed. The Vice-Chancellor decreed the relief as prayed : from this decree the company appealed, and on argument thereof the Court reversed the decree so pronounced, and dismissed the bill ; but, under the circumstances, without costs.

The Home District Mutual Insurance Company
v. Thompson, 247.

NEW TRIAL.

(IN CRIMINAL CASES.)

Held, affirming the judgment of the Court of Common Pleas, that under the statute (20 Vic. ch. 61) the Court is not empowered to grant a new trial in criminal cases on any ground apart from what was done by either the Court or the jury at the trial ; such as the alleged discovery of new evidence, or a disappointment in obtaining witnesses.

The Queen v. Gray, 501.

NON-RESIDENTS.

See "Pleading."

NOTICE.

See "Mortgage," 1.

PARTIES.

(DEMURRER FOR WANT OF.)

See "Practice," 1.

PAYMENT.

See "Specific Performance."

PEW HOLDER.

See "Disturbance."

PLEADING.

A non-resident owner of lands in a municipality is not liable to be proceeded against by action for the recovery of rates imposed in respect of such lands, unless it be averred and proved that the owner had personally or in writing informed the assessor that he owned the property, and desired to be assessed therefor; and the omission of the declaration to aver such request is not cured by the defendants suffering judgment to go by default.

Berlin v. Grange, 279.

See also "Practice," 1.

PRACTICE.

1. The plaintiffs in the Court below having filed their bill to redeem, setting forth in a schedule the names of certain parties who had purchased portions of the mortgage premises, and *charging them with notice* of the defect in the title, but none of whom were made parties, nor was any reason assigned for not including them as parties to the suit; one of the defendants put in a general demurrer for want of parties, which upon argument before the Vice-Chancellor was overruled, on the ground that the prayer of the bill was in the alternative, and to the relief prayed by one of those alternatives the plaintiffs were entitled without those parties being present. *Held*, on appeal, that if for any part of the relief prayed other parties are necessary to be brought before the Court, a demurrer to the whole bill will hold; *but*, as the defendant had subsequently to the order overruling the demurrer put in his answer, *held*, that he was too late in making an appeal from that order, and the appeal from the order overruling the demurrer was dismissed *without costs*.

Simpson v. Smyth, 9.

2. A bill having been filed against trustees and executors, residing at Montreal, in the Province of Lower Canada, for an account of the estate of the testator, who, at the time of his death, and for some years previously, had been domiciled there; the trustees, &c., although not obliged to do so, had appeared to, and answered the bill, submitting to account, &c., in such manner as the Court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important

difference as to the responsibility incurred by them according to the laws of Upper Canada, and what they would have incurred according to the laws of Lower Canada, but which at the time of filing their answer they were not aware did exist; they then moved the Court, upon affidavits setting forth these facts, to be allowed to file a supplemental answer, for the purpose of stating the fact of foreign domicile, and the law of Lower Canada, according to which alone they had always acted.

Held, that under the circumstances, they ought to be allowed to file a supplemental answer, for the purpose of placing these facts upon the pleadings; and *held*, also, that although the effect of such permission might be to enable the parties to set up a defence of the want of jurisdiction in the Courts of this Province, to interfere in the subject matter of the suit, still that was not any objection against it, but rather a reason why they should be permitted to file the supplemental answer.

Torrance v. Crooks, 230.

Held, per Cur., (*Esten, V.C., dissentiente*), that the practice hitherto pursued in the Court of Chancery of confirming the Master's report, when the account has been taken *ex parte*, and without notice to the defendant, is irregular; and that the Court was right in refusing to confirm the report, notwithstanding that had been the practice ever since the order in question was made — [1 Grant's Ch. Rep. 257.]

Hawkins v. Jarvis, 246.

4. *Held*, affirming the judgment of the Court below, that a writ of execution against the goods of an absconding debtor, issued upon a judgment entered up prior to his absconding, was entitled to priority over writs of attachment placed in the Sheriff's hands before such execution; notwithstanding the judgment, upon which it had been sued out, was entered up upon a cognovit in a cause in which no process had been served or executed before the suing out of the writs of attachment. [Sir J. B. Robinson, Bart., C.J., *McLean, J.*, and *Spragge, V.C.*, dissenting.]

Carroll v. Potter, 341.

See also "Delivery of Goods."

"Evidence."

PRINCIPAL AND AGENT.

See "Specific Performance," 1.

RESCISSION OF CONTRACT.

PRINCIPAL AND SURETY.

See "Equitable Assets."

REDEMPTION.

(POWER OF COURT TO REFUSE.)

1. Per *Robinson*, C. J., and *McLean*, J.—The Court of Chancery, under the 11th section of the Chancery Act may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.

Per *Macaulay* and *Smith*, Ex CC.—That the Court has not, under this section, power to refuse redemption, where by the law of England the party would be entitled to redeem, but has only a discretion of imposing terms different from those that would be imposed according to the strict rules in England.

Simpson v. Smyth, 9.

2. The Court of Chancery, under the 11th section of the Chancery Act, may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession.

S. C. 172.

See also "Mortgage," 2.

REGISTRATION.

See "Mortgage," 1.

RE-PURCHASE.

(SALE WITH RIGHT OF.)

See "Mortgage," 2.

RESCISSION OF CONTRACT.

Where a party, complaining of fraud in the execution of a contract, filed a bill to have it rescinded, and it appeared that after discovering what was alleged as fraud on the part of the vendor, the vendee had continued to deal with the property, the subject of the contract :

Held, that on that account, if even the fraud had been clearly

established, the vendee was not entitled to the relief prayed, and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the Crown, as where the lands have been granted.

Bown v. West, 111.

SALE.

(WITH RIGHT OF RE-PURCHASE.)

See "Mortgage," 2.

SPECIFIC PERFORMANCE

A. authorised his agent to sell his estate for £500 *cash*; and the agent instead of receiving *cash*, accepted bills from the vendee, drawn on his, the vendee's agent in Europe, which bills the agent applied to his own use, by transmitting them to his correspondents, to whom he was largely indebted, and who placed the proceeds, when honoured, to his credit.

Held, reversing the decision of his Honour, the Vice-Chancellor, that A. was not bound by such acts of his agent, that this was not a payment to A., and that until he received the amount of the purchase money in *cash*, he was not bound to execute a deed of the premises.

Brown v. Smart, 148.

SUMMONS.

(EXECUTION IN ACTION NOT COMMENCED BY.)

See "Practice," 4.

SUPPLEMENTAL ANSWER.

See "Practice," 2.

TAXES.

(ACTION FOR.)

See "Pleading."

TIME OF THE ESSENCE OF THE CONTRACT.

In contracts for the sale and delivery of flour at a future day and in like cases, time is strictly of the essence of the contract.

Coleman v. McDermott, 445.

TRESPASS.

See "Grant from the Crown," 2.

WILL.

A testator, by his will, gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail ; and in a subsequent part of the will added, "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. Baby, at Hamilton : " by a codicil, executed on the same day as the will, after making certain alterations in his will, he added, "And I do hereby devise to my niece, Mrs. Baby, of Hamilton, the lot containing one-fifth of an acre fronting on School Street, in the town of Kingston : "

Held, (first,) affirming the decision of his Honour, the Vice-Chancellor, that the words "I wish and desire" were not precatory merely, but directory, and formed a charge upon the residuary estate ; and, (secondly,) reversing the judgment of his Honour, that the devise, in the codicil, of the town lot in Kingston, was cumulative, and not substitutional.

Baby v. Miller, 218.

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